Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 05-255
Competition in the Market for the	)	
Delivery of Video Programming	)	

TO: The Commission

REPLY COMMENTS OF THE
ABC, CBS AND NBC
TELEVISION AFFILIATE ASSOCIATIONS

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, and the NBC Television Affiliates Association (collectively, the "Network Affiliates"), by their attorneys, reply to the comments filed in response to the Commission's *Notice of Inquiry* in this proceeding, released by the Media Bureau on August 12, 2005.

In this proceeding, the American Cable Association (ACA), the Broadband Service Providers Association (BSPA), Echostar, and DirecTV filed comments that are, in varying degrees, critical of the current retransmission consent policies. The arguments raised in these comments are similar to the ones resolved by the Commission in the Commission's *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005). In that proceeding, the Network Affiliates provided a full analysis and critique of the arguments now being advanced against the retransmission consent policies in the above-captioned docket.

Accordingly, we hereby attach and incorporate by reference those Comments and Reply Comments[1] for further consideration by the Commission.

Respectfully submitted,

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[1] Originally filed in *Inquiry Required by the Satellite Home Viewer Extension and Reathorization Act on Rules Affecting Competition in the Television Marketplace* (MB Docket No. 05-28).

<u>EXHIBIT A</u>

Comments of the ABC, CBS, FBC, and NBC Television Affiliate Associations

in MB Docket 05-28

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Required by the Satellite Home	)	MB Docket No. 05-28
Viewer Extension and Reauthorization Act on	)	
Rules Affecting Competition in the	)	
Television Marketplace	)	

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Summary

The purpose of the retransmission consent regulatory regime is to protect the ability of broadcast stations to control the retransmission and distribution of their signals by allowing the marketplace, with minimal government intrusion, to establish the terms and conditions for retransmission of broadcast signals by third parties. The history of the Commission's retransmission consent rules confirms the obvious: The Commission's rules work. Neither the Commission nor a court has ever determined that a broadcast station has abused the retransmission consent process or that the rules are, in any sense, anti-competitive. Now that the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") has extended the "good faith" negotiation requirement to third parties seeking to retransmit broadcast signals, the competitive playing field has been leveled even further. Thus, the Network Affiliates see no warrant for the Commission to recommend any additional government intrusion into this realm of private contractual negotiations.

The purpose of the Commission's program exclusivity rules is to protect the freedom of broadcasters, networks, and program syndicators to bargain and contract for program exclusivity so that their capital may be deployed to create and distribute the best and most diverse combination of national and local television programming possible for local communities and viewers throughout the nation. The rules simply provide a forum (viz. the Commission) for enforcement of limited program exclusivity arrangements entered into by television stations. The history of this scheme confirms that the Commission's rules work. Program exclusivity is essential to "localism" and the financial viability of local television stations to provide the all-important mix of national and local broadcast programming. As with the retransmission consent rules, the Network Affiliates see no reason for further government intrusion into these private contractual negotiations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace	))))	MB Docket No. 05-28

COMMENTS OF THE ABC, CBS, FBC, AND NBC TELEVISION AFFILIATE ASSOCIATIONS

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the "Network Affiliates"), by their attorneys, hereby submit these comments in response to the *Public Notice* ("*Notice*"), DA 05-169, released by the Media Bureau on January 25, 2005, in the above-referenced proceeding.[1] The Media Bureau seeks comment, pursuant to section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"),[2] on how the Commission's rules governing retransmission consent and program exclusivity affect competition in the multichannel video program distribution market.

I. Retransmission Consent

The Commission's current retransmission consent rules,[3] for all MVPDs and broadcast

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[1] The Network Affiliates collectively represent approximately 800 local television stations affiliated with the ABC, CBS, Fox, and NBC Television Networks.

[2] Pub. L. No. 108-447, Div. J, Tit. IX (2004).

[3] *See* 47 U.S.C. § 325(b); 47 C.F.R. §§ 76.64-76.70.

stations, are grounded in the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").[4] The notion of retransmission consent, however, predates the 1992 Cable Act. From the early days of the Radio Act of 1927, Congress allowed broadcasters to control the use and retransmission of their signals by certain third parties. Having invested in the cost of construction and operation of a broadcast station and in the cost of production and acquisition of programming, the indiscriminate, unauthorized retransmission of a station's signal by other stations was thought to be unfair, unreasonable, and contrary to the scheme of broadcast facility allocation to *local* communities which had been carefully devised by Congress and implemented by the Commission.

In 1959, however, the Commission determined that it did not have the jurisdiction to apply the retransmission consent requirement of section 325(a) of the Communications Act of 1934 to cable systems.[5] At that time, the average cable system provided three channels and served between 500 and 1000 subscribers[6]—they were, in fact, "community antenna systems," as they were then called. These early cable systems were created to retransmit broadcast signals via "cable" to improve reception of local stations within their authorized service areas. Despite their small size and limited service, the Commission, nevertheless, recognized the economic impact that these nascent cable systems could have on local television stations and the Commission's carefully crafted plan of allocation of television channels to local communities. The Commission determined that it would recommend to Congress that cable systems be required to obtain the consent of the originating

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[4] Pub. L. No. 102-385 (1992).

[5] *See Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting*, 26 FCC 403 (1959), at ¶¶ 65-68.

[6] *See id.* at ¶ 10.

station as a condition precedent to retransmission of the station's signal in order to respect the station's property rights in its signal, correct the obvious competitive unfairness, and preserve the integrity of the Commission's channel allocation scheme.[7]

Since then, cable television evolved from a mechanism for simply relaying broadcast station signals into a multichannel video program distribution service capable of providing dozens, and later hundreds, of programming channels. By the time of the 1992 Cable Act, Congress recognized that the cable system exception to retransmission consent

> has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting. Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.[8]

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[7] *See, e.g., id.* at ¶ 92. Congress failed to act on the Commission's recommendation at that time, and, in 1968, as cable television continued to develop, the Commission proposed—despite its 1959 holding—a modified retransmission consent regime that would apply to cable only in certain circumstances. But the Commission intentionally refrained from acting on its proposal to give Congress additional time to act or otherwise provide guidance, *see Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna TV Systems*, Notice of Proposed Rulemaking and Notice of Inquiry, 15 FCC 2d 417 (1968), and it was subsequently abandoned as a workable proposal, *see id.*, Second Further Notice of Proposed Rule Making, 24 FCC 2d 580 (1970); *Commission Proposals for Regulation of Cable Television*, 31 FCC 2d 115 (1971).

[8] S. REP. 102-92, at 35 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168; *see also* H.R. CONF. REP. 102-862, at 58 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1240 ("Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the two industries.").

Congress was especially concerned that broadcasters had been competitively encumbered and that the absence of a retransmission consent requirement "will continue to harm the system of free, universally available, local broadcasting which was central to the scheme created by the 1934 Act."[9] In eliminating the retransmission consent exception for MVPDs, Congress sought to "establish a marketplace for the disposition of the rights to retransmit broadcast signals" but cautioned that it was not its intent to "dictate the outcome of the ensuing marketplace negotations" for retransmission of broadcast stations.[10]

When Congress established the modern retransmission consent regime and attempted to re-balance the then un-level competitive playing field, it expressly relied upon the additional protections afforded to local broadcast stations by the Commission's program exclusivity rules as crucial mechanisms that would permit television stations to exercise their rights to the fullest extent possible. In fact, Congress observed that amendments or deletions of the program exclusivity rules in a manner that would usurp localism would be "inconsistent with the regulatory structure" crafted by the 1992 Cable Act.[11] And Congress itself further expressly contemplated that broadcast stations, in exchange for retransmission consent, would seek compensation, would enter into joint marketing

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[9] S. REP. 102-92, at 55-56, 1992 U.S.C.C.A.N. at 1188-89; *see also* H.R. CONF. REP. 102-862, at 57, 1992 U.S.C.C.A.N. at 1239. The Commission also recognized that one of the principal goals of the 1992 Cable Act was "to place broadcasters on a more even competitive level and thus help preserve local broadcast service to the public." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994), ¶ 104.

[10] S. REP. 102-92, at 36, 1992 U.S.C.C.A.N. at 1169.

[11] *Id.* at 38, 1992 U.S.C.C.A.N. at 1171; *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 6723 (1994), ¶ 114 (noting that the policies of both retransmission consent and program exclusivity "promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view").

efforts with cable operators, or would seek to program an additional channel on a cable system.[12] In particular, Congress observed: "Cable operators *pay* for the cable programming services they offer to their customers; the Committee believes that *programming services which originate on a broadcast channel should not be treated differently*."[13]

Since the inauguration of the current retransmission consent scheme some dozen years ago, there has been little occasion or need to alter it. In SHVERA's predecessor, the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),[14] Congress sought to foster competition between cable operators and satellite carriers, while at the same time preserving broadcast localism, by, *inter alia*, providing a compulsory copyright license for the retransmission by satellite of local television signals.[15] To ensure that this new competitive scheme would be given the opportunity to work effectively, Congress required that broadcasters negotiate retransmission consent rights in "good faith" and prohibited them from entering into an exclusive retransmission consent agreement with an MVPD. By this "good faith" requirement, Congress envisioned that a

> television station may generally offer different retransmission consent terms or conditions, including price terms, to different distributors. The FCC may determine that such different terms represent a failure to negotiate in good faith only if they are not based on competitive

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[12] *See* S. REP. 102-92, at 35-36, 1992 U.S.C.C.A.N. at 1168-69.

[13] *Id.* at 35, 1992 U.S.C.C.A.N. at 1168 (emphasis added).

[14] Pub. L. No. 106-113 (1999).

[15] *See, e.g.*, H.R. CONF. REP. 106-464, at 92 (1999) (stating that "the Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism" and, "perhaps most importantly, the Conference Committee is aware that in creating compulsory licenses, it is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders [requiring it] to act as narrowly as possible to minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate"); *see also* H.R. REP. 106-79(I), at 15 (1999).

marketplace considerations.[16]

SHVERA now makes this good faith negotiating requirement reciprocal and applies it to all MVPDs as well as to broadcasters.[17] The Commission itself has recognized that SHVIA did not "contemplate an intrusive role for the Commission with regard to retransmission consent" or "grant the Commission authority to impose a complex and intrusive regulatory regime similar to the program access provisions" or "intend the Commission to sit in judgement of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD."[18] In fact, as the Commission observed, "[R]etransmission consent negotiations are *the market* through which the relative benefits and costs to the broadcaster and MVPD are established."[19] And, most recently in SHVERA, Congress once again recognized that the satellite industry's compulsory copyright license effectively gives these broadcast industry competitors a "Government subsidy."[20] This compulsory copyright license, as Congress observed, provides "valuable accommodations that benefit the DBS industry."[21]

The Network Affiliates believe the current retransmission consent process furthers the interest of competition in the programming marketplace, and there is no evidence to the contrary.

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[16] H.R. CONF. REP. 106-464, at 105; *see also Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*"), at ¶ 56 (listing bargaining proposals that presumptively are consistent with competitive marketplace considerations and the good faith negotiation requirement).

[17] *See* SHVERA, § 207 (amending 47 U.S.C. § 325(b)(c)(3)).

[18] *Good Faith Order*, at ¶¶ 13, 23.

[19] *Id.* at ¶ 53 (emphasis added).

[20] H.R. REP. 108-660, at 53 (2004) (statement of Rep. Berman).

[21] *Id.* at 9 (Judiciary Committee report).

During the past dozen years, consisting of four retransmission consent election cycles for cable and one election cycle for satellite as well as the thousands of individual negotiations that have occurred between broadcasters and MVPDs, the Commission has been confronted with *fewer than 10* complaints arising from the retransmission consent process, and it has been necessary for the Commission to adjudicate a retransmission consent dispute in only *one* instance.[22] And, in that one case, the Commission not only found that the broadcaster *had not* violated the regulatory scheme or the good faith negotiation requirement but, instead, that the MVPD complainant, EchoStar, *had* abused the Commission's processes.[23] Thus, the record of retransmission consent negotiations speaks for itself.

In addition to the lack of any evidence of a break-down in the retransmission consent process, there is no evidence of any break-down in the marketplace itself. It is well-known that, following the 1992 Cable Act, cable operators resisted direct payment of cash to stations in exchange for

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[22] In all but the one instance, the parties either reached a private settlement or the Commission dismissed or found moot the retransmission consent issue. *See EchoStar Satellite Corp. v. Clear Channel Communications*, Public Notice, Report No. 3742 (July 24, 2000) (complaint dismissed upon request of parties); *EchoStar Satellite Corp. v. Chris-Craft Broadcasting*, Public Notice, Report No. 3743 (July 28, 2000) (complaint dismissed upon request of parties); *EchoStar Satellite Corp. v. Landmark Communications*, DA 00-2102 (rel. Sept. 15, 2000) (complaint dismissed upon request of parties); *Paxson Communications Corp. v. DirecTV*, DA 02-102 (rel. Jan. 14, 2002) (issue moot); *Monroe, Georgia, Water, Light, and Gas Comm'n v. Morris Network, Inc.*, DA 04-2297 (rel. July 27, 2004) (issue dismissed by Media Bureau); *Horry Telephone Coop. v. GE Media, Inc.*, DA 05-136 (rel. Jan. 26, 2005) (complaint dismissed upon request of parties).

In addition to these resolved disputes, on January 19, 2005, CoxCom, Inc. filed a "good faith" negotiation complaint against Nexstar Broadcasting. That matter is pending at the Commission.

Finally, the well-known dispute between Time Warner Cable and ABC, Inc. involved a question of the application of the must-carry rules at the Commission, not the retransmission consent regime, in which the Commission found Time Warner Cable's removal of ABC's stations' signals during a sweeps period to be in violation of section 614(b)(9) of the Communications Act. *See Time Warner Cable*, DA 00-987 (rel. May 3, 2000) and DA 01-636 (rel. Mar. 9, 2001).

[23] *See EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (2001).

retransmission consent rights. Instead, some broadcasters negotiated for and received (to varying degrees) consideration of other kinds, such as an agreement by a cable operator to purchase advertising on the stations; an agreement by a cable operator to promote broadcast stations on cable program service channels; an agreement by a cable operator to allow a broadcast station to sell local advertising time in cable program services; and/or an agreement by a cable operator to carry a local news channel or to carry other programming channels owned by the broadcast company, the latter of which has led to the creation and launch of additional and more diverse cable programming services. Assertions have been made from time to time, principally by small cable operators, that these retransmission consent agreements have somehow led to the increases in the subscription rates charged to cable and satellite customers. Recently, however, the General Accounting Office determined that broadcaster ownership of national cable networks, whose cable carriage is ensured through the retransmission consent negotiation process, does not result in cable systems paying higher fees for such broadcaster-owned networks than for other cable networks:

> In particular, we found that cable networks that have an ownership affiliation with a broadcaster did not have, on average, higher license fees (i.e., the fee the cable operator pays to the cable network) than cable networks that were not majority-owned by broadcasters or cable operators.[24]

In addition, the GAO had evidence that "at least *half* of the license fees cable operators pay to carry their networks are recouped through the sale of the local advertising time that cable networks allow the cable operators to sell."[25]

In sum, the purpose of the current retransmission consent regulatory regime is to protect the

[24] U.S. General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 (Oct. 2003), at 28-29.

[25] *Id.* at 24 (emphasis in original).

ability of broadcasters to control the retransmission and distribution of their signals by allowing the marketplace, with minimal government intrusion, to establish the competitive terms of retransmission of broadcast signals by non-broadcast means. The history of the retransmission consent rules shows that they have worked over the past dozen years, and neither the Commission nor a court has ever determined that a broadcast station has abused the retransmission consent process or that the rules are, in any sense, anti-competitive. That record is all the more remarkable given the thousands of negotiations that have taken place between television stations and MVPDs since 1992. Now that SHVERA has made the good faith negotiation requirement reciprocal, the playing field has been leveled even further, and the Network Affiliates see no warrant for the Commission to recommend additional government intrusion into these of private contractual negotiations.

II.
Program Exclusivity

The history of the current program exclusivity rules[26] need not be recounted in full detail to understand that their purpose and structure are, like those of the retransmission consent regime, designed to protect "localism" and the private contractual rights of broadcasters and, thus, to further the broad distribution of diverse programming to the public. The first program exclusivity rule, a predecessor to the current network nonduplication rule, was promulgated in 1965. Against the background of Congress not having acted upon an earlier recommendation by the Commission to apply retransmission consent to cable, the Commission stated that "reasonable nonduplication

[26] The program exclusivity rules include the network nonduplication rules, *see* 47 C.F.R. §§ 76.92-76.95, 76.120-76.122, and the syndicated program exclusivity rules, *see* 47 C.F.R. §§ 76.101-76.110, 76.120, 76.123-76.125. Related to the program exclusivity rules are the sports blackout rules, *see* 47 C.F.R. §§ 76.111, 76.120, 76.127-76.130.

requirements will serve, in part, to achieve the equalization of competitive conditions at which the 'rebroadcasting consent' proposal is, in large part, aimed."[27] This was followed, in 1972, by the first syndicated exclusivity ("syndex") rule, which was adopted as a result of a "Consensus Agreement" that had been negotiated by the cable, broadcast, and program production industries to facilitate passage of copyright legislation. The Commission expressed the view that this additional program exclusivity rule would "protect local broadcasters and insure the continued supply of television programming" which, the Commission noted, is "fundamental to the continued functioning of broadcast and cable television alike."[28]

Following the 1976 revision to the Copyright Act, which created the section 111 compulsory copyright license, the Commission soon took the view that the unfair competition between cable operators and broadcast stations that the syndex rules were aimed at ameliorating was actually coextensive with the issue of copyright liability, which had just been resolved in the 1976 Act, so that there remained no reason to retain the syndex rules.[29] Because the Commission determined that the potential effect of eliminating syndex protection both on local station audiences and on program supply would be minor, the Commission repealed the syndex rules in 1980.[30]

By the late 1980s, however, the Commission found that its earlier analysis leading to the repeal of the syndex rules had been misdirected. In reinstituting syndex rules in 1988, while maintaining its network nonduplication rules, the Commission determined that it had

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[27] *Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, 38 FCC 683, 706 n.37 (1965).

[28] *Cable Television Report and Order*, 36 FCC 2d 143, 169 (1972).

[29] *See Cable Television Syndicated Program Exclusivity Rules*, 79 FCC 2d 663 (1980), ¶ 193.

[30] *See id.* at ¶¶ 217, 242.

previously—and incorrectly—focused on competitors rather than on competition.[31] Thus, in properly refocusing on how the competitive market process operates, the Commission sought to remove government intrusion into that process and, therefore, "to remove anticompetitive restrictions on the ability of broadcasters to serve their viewers."[32] The prior repeal of the syndex rules in 1980 was, as noted above, a direct consequence of the institution of the new section 111 compulsory license, but, because that compulsory license was an abrogation of full copyright liability, such a license already represented a movement *away* from a market situation. The repeal of syndex protection itself, then, "given the existence of the compulsory license, moved the marketplace *further away* from effective freedom of contract."[33] Without regard to specific competitors, competition itself suffered as a consequence, since, as the Commission recognized, "[f]reedom of contract and, in general, enforceable property rights, are essential elements of a competitive marketplace."[34]

Therefore, during its Program Exclusivity rulemaking proceeding, the Commission essentially decided that it needed to minimize government interference so

> (1) that its regulations foster a level playing field among the various competitors, including those who produce and those who distribute [programming]; and (2) that freedom of contract, and thus private property rights, are unimpeded by the Commission's regulation or

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[31] *See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299 (1988) ("*Program Exclusivity Order*"), at ¶ 23.

[32] *Id.* at ¶ 1.

[33] *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Notice of Inquiry and Notice of Proposed Rule Making, 2 FCC Rcd 2393 (1987) ("*Program Exclusivity NPRM*"), at ¶ 26 (emphasis in original).

[34] *Id.*

deregulation of the industries.[35]

The Commission observed further:

> For competition to maximize consumer benefits, it is important that a property rights framework be applied that permits markets to operate effectively. Failure to supply an appropriate structure of rules and regulations will lead to market failures in satisfying consumer preferences. To ensure free and efficient functioning of competitive market processes, the Commission seeks to permit equality, to the extent possible within our regulatory framework, of contractual opportunity among competing modes of distribution. In the instant setting, that means permitting broadcasters to acquire and enforce the same kinds of exclusive performance rights that competing suppliers are now permitted to exercise. Failure to supply parity in contractual freedom will bias the nature of competitive rivalry among competing suppliers in ways not grounded in operating efficiencies but instead based on artificial handicaps exacerbated by disparate regulatory treatment.[36]

The 1980 removal of syndex protection had tilted the competitive playing field in cable's favor (a particular competitor) since cable operators had the ability to enter into exclusive contracts with program suppliers, but broadcast stations did not. The Commission saw that this lack of contractual parity had skewed the video programming market, to the detriment not only of broadcasters and their advertisers but also of television viewers. Broadcasters' "inability to enforce exclusive contracts puts them at a competitive disadvantage relative to their rivals who can enforce exclusive contracts; their advertisers' abilities to reach as wide an audience as possible are impaired; and consumers are denied the benefits of full and fair competition: higher quality and more diverse programming, delivered to them in the most efficient possible way."[37]

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[35] *Id.* at ¶ 5.

[36] *Id.* at ¶ 12.

[37] *Program Exclusivity Order*, at ¶ 62. The Commission found the illogic of the lack of syndex protection particularly telling:

(continued...)

Ultimately, the Commission concluded that syndex protection was necessary as a counter-weight to an imperfect compulsory license scheme where copyright holders are not paid the full value for the right to distribute their works, i.e., copyright holders are paid a price not set by the marketplace. The Commission determined that the potential negative effect of the disincentive to produce and distribute programming that consumers might desire could be countered by re-introducing a parity in property rights in the form of syndex protection. As the Commission stated: "[S]yndicated exclusivity rules are an important component of a sound communications policy designed to foster full and fair competition among competing television media. Without syndicated exclusivity, there is a likelihood that programs will not be distributed efficiently among alternative outlets and that viewers will not get the most efficient quantity and diversity of programming."[38]

Although network nonduplication was not subject to the same repeal and reinstitution as

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[37](...continued)

> Normally, firms suffer their most severe losses to competitors when they fail to offer the services most desired by the public. In the absence of syndicated exclusivity, extensive duplication reverses this relationship for broadcasters—they suffer their most severe loss precisely when they offer programming most desired by audiences; thus diversion is an indication of a competitive imbalance that results from the absence of the rules. Firms that choose to exhibit programming on an enforceable exclusive basis (e.g., cablecasters) generally do not face the problem of audience diversion to duplicative product. The fact that only broadcasters suffer this kind of diversion is stark evidence, *not* of inferior ability to be responsive to viewers' preferences, but rather of the fact that broadcasters operate under a different set of competitive rules. All programmers face competition from alternative sources of programming. Only broadcasters face, and are powerless to prevent, competition from the programming they themselves offer to viewers.

Id. at ¶ 42 (emphasis in original).

[38] *Id.* at ¶ 75.

syndex, the Commission has been well aware that any differences between network nonduplication and syndex appear "to be more one of degree than of kind" and that the "same policy arguments" apply to both.[39] Finally, then, following the 1988 reinstitution of syndex protection together with the maintenance of network nonduplication protection and the adoption of the modern retransmission consent regime following the 1992 Cable Act, the Commission was able to eliminate the "artificial handicaps exacerbated by disparate regulatory treatment."[40]

In adopting regulations to implement SHVIA in 1999, the Commisison, while attempting to level the competitive playing field between cable operators and satellite carriers, remained "cognizant also of the important protection that the exclusivity rules provide to broadcasters and copyright holders."[41] Accordingly, the Commission attempted to structure the program exclusivity and sports blackout rules[42] in the satellite context to be as parallel as possible to the analogous rules in the cable context.

Periodically, the Commission has had to resolve requests from cable operators and from broadcasters for waiver of, or special relief from, the program exclusivity rules. The Commission has a well-established waiver policy applicable in these circumstances, and it appears that the availability of a waiver, provided the Commission's waiver criteria are satisfied, ameliorates any

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[39] *Program Exclusivity NPRM*, at ¶ 48.

[40] *Id.* at ¶ 12.

[41] *Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplicaiton, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, 15 FCC Rcd 21688 (2000), at ¶ 5.

[42] As the sports blackout rules are intended and designed to protect the rights of third party entities that are not FCC licensees, e.g., sports leagues and sports teams, they appear to have little impact on the competitive video programming marketplace as between the principal competitors in that marketplace, i.e., broadcasters, cable operators, and satellite carriers. Consequently, the Network Affiliates do not intend to focus on the sports blackout rules in these comments.

potential harm that might result from strict operation of the Commission's regulations.[43] Indeed, in some cases, the Commission has viewed a failure of the marketplace as a prerequisite to considering the merits of a waiver request.[44] And in at least one case, grant of a waiver was predicated upon the private settlement between cable operators and broadcasters of a long-running, contentious dispute over network nonduplication and syndex protections.[45] There is no evidence, however, that these occasional waiver and special relief requests are unduly burdensome on the Commission's resources or that their dispositions have had negative implications for competition.

In sum, the purpose of the current program exclusivity rules is to protect the freedom of contract of broadcasters, networks, and program syndicators so that their capital may be deployed to create and distribute the best and most diverse television programming possible and, thereby, to maximize consumer welfare. The history of this scheme confirms that it has worked since the reinstitution of syndex protection in 1988, and there is no evidence of substantial marketplace failure. As with retransmission consent, the Network Affiliates see no warrant for the Commission to recommend additional government intrusion into this realm of purely private contractual negotiations.

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[43] *See, e.g.*, *KKTV, Inc.*, 6 FCC Rcd 3621 (1991), at ¶ 6 (stating that the "special relief process exists as a safety valve[] to ensure that the rules are allowed to operate in accordance with their intended purposes"); *Continental Cablevision of Ohio, Inc.*, 7 FCC Rcd 499 (1992), ¶ 6 (same).

[44] *See, e.g.*, *King Videocable Co.*, 6 FCC Rcd 2218 (1991), at ¶ 5 (denying waiver where the cable operator failed to demonstrate that the matters of which it complained could not be resolved through negotiations between the involved parties).

[45] *See Desert Empire Television Corp.*, 10 FCC Rcd 7114 (1995).

III.
Potential Effects on Competition in the Television Marketplace Due to Industry-Specific Differences in the Current Regulatory Structure

With SHVIA, and now SHVERA, Congress has made the competitive playing field with respect to cable operators and satellite carriers ever more level. Particularly with SHVERA permitting, but not requiring, satellite carriers to retransmit the signals of stations into areas in which they are significantly viewed and extending to satellite carriers a compulsory copyright license to retransmit the signals of low power television stations in certain circumstances, the overall compulsory copyright license schemes are largely parallel for these two competitors. These changes are so new, however, that it is premature for the Commission to determine at this juncture whether further statutory change in the scope of the compulsory licenses is necessary.

It appears, instead, that the most substantial differences in the compulsory license schemes for cable and satellite relate not to the scope of the licenses but rather to royalty rates. But, (i) as the royalty rates are immaterial in television stations' negotiations with MVPDs for retransmission consent rights or in television stations' negotiations with their networks for network nonduplication protection or with program syndicators for syndex protection and (ii) the Commission does not have jurisdiction with respect to such royalty rates, the Network Affiliates do not comment at this time in this proceeding as to whether there should be any changes in the royalty rate structures.

Both Congress and the Commission, through this proceeding and the subsequent report to Congress, intend to investigate whether rural cable operators are somehow being disadvantaged vis-à-vis satellite carriers with respect to the delivery of *digital* broadcast television signals to consumers.[46] As an initial matter, the Network Affiliates note that small cable operators, i.e., those with fewer than 1000 subscribers, are exempt from the Commission's network nonduplication and

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[46] *See* SHVERA, § 208(a).

syndex rules,[47] that the small cable operator exceptions apply to a *majority* of rural cable operators,[48] and that the exceptions represent a government override of privately negotiated contracts between, and the property rights of, television stations and their program suppliers. Thus, the Commission already provides small cable operators government benefits not extended to their competitors. In any event, it is premature to determine whether the current regulatory scheme impairs the ability of rural cable operators to compete with satellite carriers in the retransmission of *digital* broadcast signals. Satellite carriers are retransmitting few digital broadcast signals pursuant to retransmission consent agreements (only the signals of some network owned-and-operating stations in a handful of markets). Certain rural cable operators may be retransmitting digital broadcast signals, but that would depend on the bandwidth capacity of their systems and whether they have obtained retransmission consent. Because the Commission has rejected dual analog and digital carriage requirements, the digital signals of the television stations that have elected mandatory carriage may not be carried.[49] For stations that elected retransmission consent and actually entered into an analog carriage agreement with an MVPD, carriage of digital signals will also depend on the prescience at the time of negotiation of the broadcaster and the MVPD to include consent for retransmission of digital signals. In any event, because the retransmission consent and program exclusivity rules do not treat digital signals differently than analog signals, it is difficult to discern how the regulations disadvantage rural cable operators vis-à-vis satellite carriers, especially in light of the small cable

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[47] *See* 47 C.F.R. §§ 76.95(a), 76.106(b).

[48] As of December 2004, at least 53% of all cable systems (i.e., at least 4481 of 8409 cable systems) serve less than 1000 subscribers and therefore are not subject to the network nonduplication and syndex rules. *See* TELEVISION & CABLE FACTBOOK 2005, at F-2.

[49] *See Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, FCC 05-27 (released Feb. 23, 2005).

operator exceptions to the rules.

Conclusion

For the foregoing reasons, and as history demonstrates, there is no need for the Commission to recommend to Congress any changes in the retransmission consent and program exclusivity regimes at this time.

Respectfully submitted,

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March 1, 2005

EXHIBIT B

Reply Comments of the ABC, CBS, FBC, and NBC Television Affiliate Associations in MB Docket 05-28

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace	))))	MB Docket No. 05-28

REPLY COMMENTS OF THE ABC, CBS, FBC, AND NBC TELEVISION AFFILIATE ASSOCIATIONS

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March 31, 2005

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Summary

The comments filed by various satellite, cable, and telephone companies and organizations call for imposition of an expansive, unjustifiable regulatory scheme for broadcast retransmission consent negotiations with MVPDs. Several MVPDs propose mandatory arbitration to resolve retransmission disputes; others misstate and mischaracterize the nature, and then argue for repeal or modification, of the Commission's limited and narrowly tailored broadcast program exclusivity rules. All of them propose a regulatory scheme for the retransmission consent process that would ultimately be harmful to viewers.

The arguments made, the policy positions advanced, and the scheme of heavy-handed regulation of signal carriage negotiations proposed by the MVPDs are antithetical to a competitive market and to the interests of viewers and, therefore, should be summarily rejected. Stripped of their rhetoric, the arguments of the MVPD commenters are, in effect, arguments to protect and insulate themselves against competition from each other. It is, in short, a plea to the Commission to "save us from ourselves."

Now that pockets of competition in the MVPD market may be emerging, it would be a cruel hoax on the American people to impose regulations that would deprive viewers of the long hoped-for benefits of that competition. The regulatory scheme advanced by the MVPDs has previously been considered and rejected by Congress and the Commission.

MVPDs—some of whom are multi-billion companies and all of whom control access by broadcast stations and television programmers to the nation's television viewers—claim that local television stations have "market power," and, thus, Congress should impose a quasi-common carrier regulatory scheme to handicap their access to local broadcast signals. It is easy, of course, to allege "market power"—it is more challenging, however, to prove it. The threshold question is determining

the relevant "product" market. At a minimum, it is "television programming," and local broadcast stations, plainly, do not have "market power" in any sense in the literally *thousands* of television programs available to MVPDs. That Cox Communications, EchoStar, and the member companies of NCTA and ACA who control dozens, and, in some cases, hundreds, of channels of television programming in each local market are actually asking Congress and the Commission to intervene and adopt regulations to tilt broadcast retransmission consent negotiations in their favor borders on the incredible.

The MVPDs fail to point to any evidence of a failure of the retransmission consent process over the past twelve years. There have, in fact, been fewer than ten retransmission consent process complaints filed with Commission—less than one per year—and the Commission has never found a single instance—not one—in which a broadcast station has abused the Commission's process or violated its retransmission consent rules. That, of course, cannot be said for MVPDs. Similarly, the courts have not witnessed a rash of antitrust or unfair competition complaints by MVPDs against broadcast stations.

Not only do the MVPDs fail to point to evidence of abuse by broadcast stations of existing law, they also fail to provide any evidence or proof that the multiple legal and regulatory remedies now available to them are inadequate. The Commission has a well-structured complaint process that provides relatively rapid adjudication. A greater panoply of relief is available in federal and state courts. Mandating arbitration of retransmission consent negotiations would, perversely, result in driving costs up—costs that ultimately would be borne by television viewers. In any event, as the lack of complaints and adjudications show, neither the current rules, the Commission's processes, nor the multiple remedies available to MVPDs are broken.

The fact is MVPDs are complaining because competition between MVPDs *may* reach a point where broadcast stations *may* have limited ability to negotiate with some MVPDs for cash in exchange for carriage and resale by the MVPDs of their broadcast signals. This is, of course, precisely what Congress intended and hoped might result in extending the retransmission consent provision to cable operators in 1992 and to satellite carriers in 1999. There is no warrant to tilt the competitive playing field in favor of MVPDs now that a modicum of competition by MVPDs for broadcast signals may, at long last, be on the way.

BellSouth, EchoStar, and ACA each propose that MVPDs and broadcast stations be required to resolve retransmission consent negotiation disputes through mandatory arbitration modeled after the retransmission consent arbitration process imposed on Fox's television stations as a condition of News Corp.'s acquisition of DIRECTV, including a requirement that stations be compelled to grant MVPDs retransmission consent while the arbitration proceeding is pending. The proposal is a solution in search of a problem. The MVPDs present no evidence to justify their proposal or any facts that suggest that the current judicial and regulatory remedies governing retransmission consent negotiations are ineffective, inappropriate, or burdensome.

News Corp.'s acquisition of DIRECTV involved a vertical merger between an MVPD and a company that also owns (a) a broadcast network, (b) television stations reaching at least 39% of the nation's households, (c) popular cable/satellite program networks, and (d) some of the world's most successful program production studios. The *News Corp.* facts are *sui generis.* No other broadcast station owner comes anywhere close to matching the market power that News Corp. possesses in the television program distribution market, and, thus, other broadcast companies cannot exercise the market power the Commission found potentially troubling in evaluating News Corp.'s acquisition of DIRECTV. Moreover, the Commission did *not* base its arbitration requirement on whether even the temporary withholding of retransmission consent might increase the compensation received by News Corp. for retransmission of its broadcast stations. Rather, arbitration was required to prevent News Corp. from extracting anti-competitive profits from other MVPDs with which DIRECTV competes by temporarily withholding retransmission consent for the Fox-owned television stations. Even so, News Corp.'s mandatory arbitration condition sunsets in six years. There is no basis to force upon all broadcast stations in perpetuity an interim and temporary condition imposed by the Commission for good cause upon a voluntary merger of unique entities. To suggest otherwise is to ignore the facts.

Various MVPDs call for repeal or modification of the Commission's network non-duplication and syndicated exclusivity rules. These arguments, however, fail to acknowledge that the Commission's regulations do not grant program exclusivity to broadcast stations. Broadcast stations negotiate and pay their program suppliers for program exclusivity in the open market, just as MVPDs do. The only thing the Commission's program exclusivity rules do, in fact, is to restrict the area of exclusivity to a small geographic area and provide a forum for enforcement of those restrictions. In stark contrast, the Commission does not regulate at all program contracts for cable/satellite programming entered into by cable and satellite companies. The arguments by the MVPDs for asymmetrical regulation of program contracts collapses from its own unfairness and illogic.

The MVPDs' comments are replete with additional "wish lists" of unjustifiable governmental intrusions into the free marketplace at the expense of broadcast stations. To take but one example of these "wishes" that are refuted in full below, BellSouth, just as it did five years ago in the SHVIA retransmission consent proceeding, advocates for non-discrimination requirements in retransmission consent negotiations. Not only did Congress reject non-discrimination requirements in SHVIA, but the history of the past five years clearly shows that they are not necessary. BellSouth speculates that broadcast stations may "take a much tougher stance" in their negotiations in the future. The difference between a "tougher" negotiating stance and an illegal or "anti-competitive" negotiating stance is obvious. If the introduction of competition in the MVPD market enhances the negotiating position of broadcast stations, that result would hardly justify the imposition by the Commission or Congress of non-discrimination requirements—any more than could be justified for imposing non-discrimination requirements on ESPN, A&E, Lifetime, or other popular cable/satellite program services not jointly owned with an MVPD. The Commission has long recognized that retransmission consent negotiations establish the competitive market of the relative benefits and costs for retransmission of broadcast signals.

MVPDs cannot have it both ways. They cannot ask Congress and the Commission to exempt them from rate regulation on the basis that they now compete with each other, head to head, and then ask the government to mandate access to their most profitable and popular sources of programming from broadcasters so that they may be insulated and protected from the very competition on which the deregulation is premised.

In sum, each of the MVPD interests is seeking greater, unjustifiable government regulation to promote their own competitive advantages. Because these requests would severely disadvantage localism and be harmful to viewers and to free over-the-air local television service, it is respectfully submitted that the Commission should not recommend to Congress these self-serving and anti-competitive proposals that are contrary to the public interest.

* * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace	)	MB Docket No. 05-28

REPLY COMMENTS OF THE ABC, CBS, FBC, AND NBC TELEVISION AFFILIATE ASSOCIATIONS

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the "Network Affiliates"), by their attorneys, reply to the comments filed in response to the *Public Notice* ("*Notice*"), DA 05-169, released by the Media Bureau on January 25, 2005.[1]

I. Preliminary Statement

Several MVPDs propose mandatory arbitration, including "baseball" style arbitration, to resolve retransmission consent negotiation disputes; others misstate and mischaracterize the nature, and then argue for repeal or modification, of the Commission's limited and narrowly tailored broadcast program exclusivity rules. All of them argue for a regulatory scheme for the retransmission consent process that would ultimately be harmful to viewers.

[1] The Network Affiliates collectively represent approximately 800 local television stations affiliated with the ABC, CBS, Fox, and NBC Television Networks.

The arguments made, the policy positions advanced, and the scheme of heavy-handed regulation of purely private signal carriage negotiations proposed by the MVPDs are antithetical to a competitive market and should be summarily rejected. Stripped of their rhetoric, the arguments of the MVPD commenters are, in effect, arguments to protect and insulate themselves against competition from each other.

Now that pockets of competition in the MVPD market may be emerging, it would be a cruel hoax on the American people to impose regulations that would deprive viewers of the long hoped-for benefits of that competition. Moreover, the regulatory scheme advanced by the MVPDs has previously been considered and rejected by Congress and the Commission.

MVPDs—some of whom are multi-billion companies and all of whom control access by broadcast stations and television programmers to the nation's television viewers—claim that local television stations have "market power," and, thus, Congress and the Commission must impose a quasi-common carrier regulatory scheme to handicap access by MVPDs to local broadcast signals. It is easy, of course, for MVPDs to allege "market power"—it is more challenging, however, to prove it. The threshold question is determining the relevant "product" market. At a minimum, it is "television programming," and local broadcast stations, plainly, do not have "market power" in any sense in the literally *thousands* of television programs available to MVPDs. That Cox Communications, EchoStar Satellite LLC ("EchoStar"), and the member companies of National Cable & Telecommunications Association ("NCTA") and American Cable Association ("ACA") who generally control dozens, and, in some cases, hundreds, of channels of television programming in each local market are actually asking Congress and the Commission to intervene and adopt regulations to tilt broadcast retransmission consent negotiations in their favor borders on the incredible. Their arguments are embarrassingly transparent. As the Commission has previously observed, it is the responsibility of the Commission to protect competition—not competitors.[2]

The MVPDs fail to point to any evidence of a failure of the retransmission consent process over the past twelve years. There have, in fact, been fewer than ten retransmission consent process complaints filed with Commission—less than one per year—and the Commission has never found a single instance—not one—in which a broadcast station has abused the Commission's process or violated its retransmission consent rules. That, of course, cannot be said for MVPDs. Similarly, the courts have not witnessed a rash of antitrust or unfair competition complaints by MVPDs against broadcast stations.

Not only do the MVPDs fail to point to abuse by broadcast stations of existing law, they also fail to provide evidence or proof that the multiple legal and regulatory remedies now available to them are inadequate. The Commission has a well-structured complaint process that provides relatively rapid adjudication. A greater panoply of relief is available in federal and state courts. Mandating arbitration of retransmission consent negotiations would, perversely, result in driving costs up—costs that ultimately would be borne by television viewers. In any event, as the lack of complaints and adjudications show, neither the current rules, the Commission's processes, nor the multiple remedies available to MVPDs are broken.

Furthermore, the retransmission consent requirement was enacted by Congress with full knowledge of the Commission's existing program exclusivity rules. As the legislative history of the 1992 Cable Act states:

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[2] *See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299 (1988) ("*Program Exclusivity Order*"), at ¶ 23.

> [T]he Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendment or deletions of those rules in a manner which would allow distant stations to be substituted on cable systems for carriage [f]or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in [the Act].[3]

Finally, the fact is the MVPDs are complaining because competition between MVPDs *may* reach a point where broadcast stations *may* have a limited ability to negotiate with some MVPDs for cash in exchange for carriage and resale by the MVPDs of their broadcast signals. This is, of course, precisely what Congress intended and hoped might result in extending the retransmission consent provision to cable operators in 1992 and to satellite carriers in 1999. There is no warrant to tilt the competitive playing field in favor of MVPDs now that a modicum of competition by MVPDs for broadcast signals may, at long last, be on the way.

II.
Mandatory Arbitration Is Unwarranted

BellSouth Corporation, EchoStar, and ACA each propose that MVPDs and broadcast stations be required to resolve retransmission consent negotiation disputes through mandatory arbitration, including, in some proposals, "baseball style" arbitration, and that stations be compelled to grant MVPDs retransmission consent while the arbitration proceeding is pending.[4] The proposal is a solution in search of a problem. The MVPDs present no evidence to justify their proposal or any facts that suggest that the current judicial and regulatory remedies governing retransmission consent negotiations are ineffective, inappropriate, or burdensome.

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[3] S. REP. 102-92 (1992), at 38.

[4] *See* BellSouth Comments at 8; EchoStar Comments at 8-11; ACA Comments at 3.

They present no such evidence because there is none. As the Network Affiliates demonstrated in their opening comments, the Commission has received *fewer than 10* complaints arising from the retransmission consent process, that is, fewer than one per year from 1993 when the current retransmission consent requirement became effective. It has been necessary for the Commission to adjudicate the merits of only one retransmission consent dispute to date, and, in that proceeding, the Commission not only found that the broadcaster *had not* violated the Commission's rules or the good faith negotiation requirement but, instead, that the MVPD (EchoStar) *had* abused the Commission's processes.[5] These dozen-plus years have witnessed four retransmission consent election cycles for cable and one election cycle for satellite during which several thousand individual retransmission consent negotiations have occurred; however, none of the MVPD commenters has provided even a single example to substantiate a need for mandatory arbitration in retransmission consent disputes or a requirement to compel retransmission consent during the pendency of disputes.

BellSouth asserts that viewers "gain nothing" if a station is permitted to withdraw or withhold retransmission consent.[6] But this places no value in the free marketplace from which broadcast stations, MVPDs, and viewers benefit. Viewers stand to gain by letting market participants exercise their rights, for if a broadcast station is able to strike a better deal by, for example, obtaining carriage rights for its digital signal or for an affiliated cable channel or a news channel or obtaining a cash payment or other compensation, viewers benefit by having access to additional television program services or from an increase in the quantity and quality of

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[5] *See* Network Affiliates Comments at 7 & n.22 (detailing the retransmission consent dispute complaints filed with the Commission); *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (2001).

[6] BellSouth Comments at 8.

programming that the station can produce or acquire with an additional revenue stream.

ACA argues that the arbitration conditions it cites that were imposed on News Corp. upon its acquisition of DIRECTV should apply "broadly."[7] But this ignores the obvious fact that that transaction was a vertical merger between an MVPD and a company that also owns (a) a broadcast network, (b) television stations reaching at least 39% of the nation's households, (c) popular cable/satellite program networks, and (d) some of the world's most successful program production studios. Quite simply, the *News Corp.* facts are *sui generis*. No other broadcast station owner comes anywhere close to matching the market power that News Corp. possesses in the program distribution market, and, thus, other broadcast companies cannot exercise the market power the Commission found potentially troubling in evaluating News Corp.'s acquisition of DIRECTV. Moreover, the Commission did *not* base its arbitration requirement on whether even the temporary withholding of retransmission consent might increase the compensation received by News Corp. for retransmission of its broadcast stations. Rather, arbitration was required to prevent News Corp. from extracting anti-competitive profits from other MVPDs with which DIRECTV competes by temporarily withholding retransmission consent for the Fox-owned television stations.[8] Even so, News Corp.'s mandatory arbitration condition sunsets in six years.[9] There is no basis to force upon all broadcast stations in perpetuity an interim and temporary condition imposed by the Commission for good cause upon a voluntary merger of unique entities. To suggest otherwise is to ignore the facts.

EchoStar incorrectly asserts that "a broadcaster failing to reach a retransmission consent

[7] ACA Comments at 3.

[8] *See General Motors Corp. and Hughes Electronics Corp.*, 19 FCC Rcd 473 (2004) ("*News Corp.*"), at Appendix D, ¶ 12.

[9] *See News Corp.* at ¶ 226.

agreement can always fall back on must-carry if it decides that carriage by an MVPD is critical to its business."[10] But that argument neglects to take into account that if a broadcast station, in its triennial election, elects retransmission consent and fails to reach an agreement with an MVPD, the station cannot then "fall back on must-carry." Once it has made its election, a station does not get a second bite at the apple in that round of elections, and, thus, in the absence of a retransmission consent agreement the broadcast station risks no carriage for the next three years.[11] The prospect of no carriage and a station's inability to reach its viewers looms over and tempers every broadcast retransmission consent negotiation.

EchoStar also asserts that its ability to threaten not to carry the broadcast station is "illusory."[12] That is simply not true. EchoStar concedes that it has "dropp[ed] carriage of a local network station or [launched] local service in a market without the Big 4 affiliate."[13] Accordingly, EchoStar's argument is contradicted by its own terms. Indeed, the Commission has recognized that "the local television broadcaster and the MVPD negotiate in the context of a *roughly even 'balance of terror*.'"[14] EchoStar further claims that it "does not object to a reciprocal obligations [sic] on both broadcaster and MVPD not to terminate retransmission during a dispute."[15] That's understandable, of course. Why should EchoStar (or any MVPD, for that matter) object to having the Commission

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[10] EchoStar Comments at 9.

[11] *See* 47 C.F.R. §§ 76.64(f), 76.66(c).

[12] EchoStar Comments at 9.

[13] EchoStar Comments at 8.

[14] *News Corp.* at ¶ 180 (emphasis added).

[15] EchoStar Comments at 10.

strip a broadcast station of its only negotiating leverage while EchoStar, at the same time, continues to profit in the interim from the resale of the broadcast station's signal? Mandatory retransmission consent while negotiations are taking place would only encourage MVPDs to increase their demands and delay negotiations. It would tilt the negotiating leverage decidedly in favor of each MVPD. EchoStar's argument is transparently self-serving.

Mandatory arbitration is not a concept uniformly embraced by MVPDs. Time Warner, the nation's second largest cable MSO, recently rejected arbitration in a high-profile retransmission consent dispute with cable sports networks on the grounds that arbitration would produce higher cable rates for its viewers. On March 8, 2005, Cablevision Systems removed two sports networks, MSG Network and Fox Sports New York, from the Time Warner Cable systems in the New York City area. Cablevision asked for higher fees and refused to permit retransmission of the two sports networks when a bargaining impasse was reached with Time Warner Cable. In other words, Cablevision withheld retransmission consent, just as a broadcast station has the right to do. Time Warner, exercising its rights, rejected arbitration and issued the following statement pointing to the potential harmful effects arbitration could have on viewers: "Binding arbitration has proven to be the fuel contributing to the skyrocketing costs of professional sports. It would be irresponsible of us to engage in a process that would force higher retail rates on our customers."[16]

If arbitration is not appropriate for cable networks, it is equally inappropriate for broadcast programming. There are no more compelling public interest justifications for imposing mandatory arbitration in the broadcast context than there is in the cable/satellite program context. And as to

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[16] *Cablevision Removes 2 Channels from Time Warner in Fee Dispute*, Bloomberg.com (Mar. 8, 2005) *available at* <http//:www.bloomberg.com/apps/news?pid=71000001&refer=us&sid =aNsAaO_lgCiQ> (visited Mar. 10, 2005).

Time Warner's astute observation, professional sports does not exactly come to mind as a business model the Commission might wish to prescribe for the broadcast/cable/satellite industries.

Finally, these MVPD commenters fail to acknowledge that there is no general legal requirement that a particular broadcast station must consent to involuntary retransmission (and, in turn, resale) of its signal in its local market. In fact, the law is precisely to the contrary: Congress has expressly required MVPDs to obtain the "express authority of the originating station."[17] The MVPD proposal of mandatory arbitration with forced carriage during the pendency of the proceeding eviscerates the congressionally-sanctioned concept of "retransmission consent."

The MVPD proposal of mandatory arbitration and mandated retransmission consent and forced carriage during the pendency of negotiation should be rejected.

III.
The Joint Cable Commenters' Attack on the Retransmission Consent Process Ignores the Marketplace, Misrepresents History, and Is Otherwise Flawed

Advance/Newhouse Communications, Cox Communications, and Insight Communications (the "Joint Cable Commenters" or "JCC") concede that "[t]hey believe the marketplace has generally operated well and in the consumer interest,"[18] that "competition in the MVPD marketplace is quite strong and growing stronger," and that "there is widespread evidence that consumers value the services they receive."[19] Yet they devote 109 pages to creating a wholly inaccurate and misleading picture of the retransmission consent process.

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[17] 47 U.S.C. § 325(b)(1)(A).

[18] JCC Comments at 3.

[19] JCC Comments, Appendix, The Social Cost of Retransmission Consent Regulations ("Rogerson Study"), at 2-3.

Were the issues in this proceeding not so serious, the attack on local broadcast stations by Cox, whose market value is in excess of twenty billion dollars and which, like the other Joint Cable Commenters, provides hundreds of channels of television programming, would be laughable. To suggest that the Commission's broadcast retransmission consent regulatory regime somehow disadvantages cable companies with hundreds of channels of programming is beyond the pale.

The Joint Cable Commenters focus much of their comment on the four broadcast networks and the purported effect of negotiations by those networks on the retransmission consent and video programming marketplace. But this portion of the marketplace, which is undoubtedly important, is but one part of the full marketplace of programming that the Joint Cable Commenters, with hundreds of channels of programming, can offer to their subscribers.[20] The Joint Cable Commenters ignore the other local non-network-owned television stations that make up the total retransmission consent marketplace and so fail to capture the breadth and diversity of the dynamics of the marketplace.

The Joint Cable Commenters also paint an inaccurate portrait of the history of retransmission consent negotiations. They repeatedly imply that the dominant form of retransmission consent consideration—carriage of affiliated network-owned cable networks—was instigated by the networks themselves, insinuating that the networks intentionally sought to foster audience fragmentation simply to drive up the cost of advertising on their broadcast stations.[21] The real

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[20] In addition, the four networks collectively own 112 television stations (of which 69 broadcast the programming of the four networks themselves), out of 1366 full power commercial television stations licensed by the Commission (not to mention the 603 Class A television stations (or the 2034 LPTV stations), some of which also negotiate for retransmission). *See Broadcast Station Totals As of December 31, 2004* (Feb. 10, 2005).

[21] *See, e.g.*, JCC Comments at 25-26 ("Indeed, *from the outset*, the four broadcast networks quickly recognized that retransmission consent offered them asset-creation and asset-appreciation (continued...)

reason non-cash consideration developed in cable retransmission consent negotiations is because the cable industry refused to pay cash.[22] The Commission reported this fact to Congress in November 2004: "During the initial retransmission consent negotiations eleven years ago, the cable industry made clear that it would not pay cash for the carriage of broadcast signals."[23]

In fact, it is still the case that cable refuses to pay, even modest sums, for retransmission consent. In the current dispute involving Nexstar stations and cable operators Cox and Cable One, a Cable One executive has publicly stated: "Our position is that we're not going to pay."[24] While

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[21](...continued)
opportunities that were unavailable to any other non-network broadcaster or non-broadcast cable programmer." (emphasis added)); 10 ("Once Fox developed the template of using cable carriage as retrans currency, the other three networks followed suit."); 26-28 (implying audience fragmentation benefits the networks' advertising rates); Rogerson Study at 4 ("The networks have generally chosen to tie retransmission consent to the carriage of relatively new channels that they are attempting to introduce . . . ."); Rogerson Study at 15 ("Fox led the way to resolving the [first election retransmission consent negotiation] impasse by creating a new network, FX . . . ."); Rogerson Study at 32 (same).

[22] *See, e.g.*, Mark Robichaux, *Tele-Communications Says It Will Fail to Meed Deadline on TV Stations' Fees*, WALL STREET J. (Aug. 18, 1993), at B8 ("Nearly all of the nation's largest cable operators have vowed to forgo paying cash to local TV stations."); Rachel W. Thompson, *Inouye to Cable: Why No Cash?*, MULTICHANNEL NEWS (Aug. 16, 1993) (reporting on Senator Inouye's request that the Justice Department and FTC investigate whether cable operators illegally colluded with one another in refusing to pay cash for retransmission consent); *Inouye Poses Antitrust Question on Retransmission Consent Decisions*, COMMUNICATIONS DAILY (Aug. 11, 1993) (reporting that 14 of the top-20 MSOs (including Newhouse) had refused to pay cash for retransmission consent); *see also* Comments of The Walt Disney Company, MB Docket No. 04-207 (filed July 15, 2004), at 41-42 & nn.57-63 (recounting history of cable's refusal to pay cash and providing additional citations).

[23] *Report on the Packaging and Sale of Video Programming Services to the Public* (FCC Nov. 18, 2004) ("*A la Carte Programming Report*"), at 74 (citing Rachel W. Thompson, *TCI Cuts 14 'Zero Pay' Carriage Agreements*, MULTICHANNEL NEWS (June 21, 1993)).

[24] Anne Veigle, *Nexstar to Pull Another TV Station in Retransmission Battle*, COMMUNICATIONS DAILY (Mar. 2, 2005) (quoting Cable One vice president Tom Basinger); *see also Mass Media Notes, Three TV stations were set to go off the air*, COMMUNICATIONS DAILY (continued...)

the Joint Cable Commenters claim that things have changed since 1992,[25] it appears that, in fact, the more they have stayed the same.

Notwithstanding the Joint Cable Commenters' revisionist history, much of their argument is illogical and without evidentiary foundation, and the evidence they do provide is piecemeal at best. Without attempting to catalog every flaw, the Network Affiliates provide responses to the following misleading assertions made by the Joint Cable Commenters:

> *Assertion*: "In recent years, popular network television shows such as 'Friends,' '24,' 'CSI,' 'Desperate Housewives,' 'Law and Order,' 'Survivor,' 'American Idol' and others have come to be regarded as 'must-have' programming." "[T]he signals of the four broadcast networks are 'must have' programming that create market power for their providers."[26]

Response: Neither communications law, Commission policy, nor economic theory recognize any such thing as "must-have" television programming. As important as broadcast television may be in the everyday lives of Americans, neither Congress, the Commission, nor the courts has suggested that any company should be given mandatory access to a broadcast station's signal at no charge so that it may be retransmitted and resold by a third party for profit. The notion that an MVPD "must have" certain broadcast station programming for the purpose of resale is absurd, as

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[24](...continued)
(Feb. 2, 2005) (reporting that Nexstar COO Duane Lammers said that "Cox refused to consider cash for carriage").

[25] *See* JCC Comments at 37-39 (arguing that the "competitive landscape" has "shifted substantially" since 1992).

[26] JCC Comments at 13 (first quotation); *id.*, Rogerson Study at 20 (second quotation). Similar, and equally flawed, assertions have been made by ACA. *See, e.g.*, Petition of ACA for Rulemaking to Amend 47 C.F.R. § § 76.64, 76.93, and 76.103 (filed Mar. 2, 2005), at 23 ("Network programming has become 'must have' programming for small cable companies.").

would be the notion that cable operators and satellite carriers should be entitled to free access to ESPN, CNN, Fox News, MTV, and other cable/satellite program services.

While it is true that much broadcast television programming is popular, the ability of local television stations to negotiate consideration from third parties who retransmit and charge their customers for that programming does not confer "market power" on local stations in an economic sense. As the Commission recently stated in *it's a la Carte Programming Report* to Congress:

> To the extent the Commission discussed the "market power" that might reside in the combined entity [in the News Corp./DIRECTV merger], it was *not* passing upon the competitive balance of negotiating power that normally exists between broadcasters/ programmers and MVPDs. All differentiated products, such as video programming, possess some degree of market power in the sense that there are no perfect substitutes. The critical question in any analysis involving differentiated products is whether the existing degree of market power is sufficient to allow the firm to profitably engage in the hypothesized anticompetitive activity.[27]

Inasmuch as cable and satellite companies can deliver dozens, if not hundreds, of channels of television program services in every market while a local television broadcast company can only own or control one or, at most, two stations in a market, it is a stretch to suggest that, somehow, local television stations possess "market power" in negotiating with MVPDs. The fact is, there is an abundance of popular television programming substitutes available on cable/satellite-only networks, including ESPN, CNN, Fox News, Lifetime, USA, The Discovery Channel, A&E, and dozens of others. It has recently been reported that cable viewing for the first time ever exceeded the seven broadcast networks in a sweeps period, achieving a 49.4 share in prime, compared with a 48.6 share for broadcast viewing, in the February 2005 sweeps. Turner Chief Research Officer Jack Wakshlag

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[27] *A la Carte Programming Report* at 70 (emphasis added).

was quoted as stating, "The end of the broadcast-dominated world is in place. Unless something incredibly extraordinary happens, broadcast will never win another sweeps."[28]

Most ironic in the assertion by the Joint Cable Commenters that they "must have" access to "must-have" local broadcast programming is their and other MVPDs' fierce fight against "must carry" requirements. Plainly, their concept of "must-have" programming is simply programming they "wish" to have for free so they can resell it to their subscribers for profit.

In the end, the short answer to the Joint Cable Commenters' complaint about access to broadcast programming is that there is nothing to prevent them from developing equally popular programming. For the government to give that programming to MVPDs for free would create an economic disincentive for MVPDs to develop competitive programming of their own, thus depriving viewers of the diversity of viewing options that would flow from the development of competitive programming. The competitive marketplace is at work, and MVPDs should not be given *free* access to programming developed and paid for by their broadcast competitors. Nothing could be more basic, more logical, or fairer and more equitable.

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> *Assertion*: "The Commission has concluded, based on its own evaluation of the evidence, that News Corp. possesses market power and this reasoning applies equally well to the other three networks."[29]

Response: This argument was expressly considered and rejected by the Commission in its *A la Carte Programming Report* to Congress. Although Rogerson in his economic report for the

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[28] *Cable Victorious in Sweeps*, BROADCASTING & CABLE TVFAX (Mar. 24, 2005), at 1.

[29] *See* JCC Comments, Rogerson Study at 24.

Joint Cable Commenters attempts to parse the language of the Commission's *News Corp.* order,[30] the simple fact is that the Commission was concerned in News Corp.'s acquisition of DIRECTV with the effects of a vertical merger. There is no escaping that context. Moreover, there is no evidence that the other three networks, let alone the typical non-network-owned television station, possess *any* market power in the distribution of television programming sufficient to lead to competitive harm. And Rogerson's failure to quote the Commission's entire rebuttal is equally telling. What the Commission told Congress in full in November 2004 is this:

> Certain parties have argued that the Commission's analysis of the transaction bears some relevance on the present discussion. *This represents a misunderstanding of the nature of the Commission's transaction review process as well as the specifics of the transaction between News Corp. and Hughes Electronics.* The transaction review process at the Commission is directed at examining *changes* in the competitive landscape that are a direct result of the transaction at issue. To the extent the Commission discussed the "market power" that might reside in the combined entity, it was *not* passing upon the competitive balance of negotiating power that normally exists between broadcasters/programmers and MVPDs. All differentiated products, such as video programming, possess some degree of market power in the sense that there are no perfect substitutes. The critical question in any analysis involving differentiated products is whether the existing degree of market power is sufficient to allow the firm to profitably engage in the hypothesized anticompetitive activity. *In the News Corp. transaction, the potential refusal to sell to competing MVPDs, or vertical foreclosure, was the activity of concern.* Commission staff rigorously measured News Corporation's incentive and ability post-transaction to engage in the hypothesized activity and determined that, while permanent foreclosure was unlikely, temporary foreclosure was a real public interest concern. Thus, *nothing* in the analysis of the News Corp./DirecTV transaction should be read to suggest that the Commission has concluded that the market power of broadcasters is sufficient to lead to competitive harm in the absence

[30] *See* JCC Comments, Rogerson Study at 24-27.

of vertical integration.[31]

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> *Assertion*: "Broadcasters bundle retransmission consent together with other cable programming they produce and use this as a bargaining chip to negotiate some combination of higher license fees and increased carriage than they otherwise would have been able to negotiate."[32]

Response: So-called "bundled" affiliated cable programming is not a "bargaining chip" in retransmission consent negotiations. It is part of the overall consideration paid to a broadcast station for its retransmission consent for its broadcast signal and other program services. As shown above, the cable industry has historically insisted upon this form of consideration for retransmission of broadcast signals rather than cash. The Joint Cable Commenters present no evidence that the "bundle" results in "higher license fees" than the station would have been able to negotiate. In fact, the "bundle" and its license fees are precisely the compensation that stations in these circumstances are able to negotiate in the competitive marketplace, nothing more and nothing less. In each such instance, the broadcast station invariably is willing to "unbundle" cable/satellite programming from retransmission consent for the broadcast signal. Indeed, in a recent retransmission consent suit filed by EchoStar against Viacom and which was settled without trial, Michael Schwimmer of EchoStar stated that EchoStar had, in an arm's-length negotiation, agreed to pay CBS a *cash-only* retransmission consent fee in July 2000 for each of the CBS-owned stations of $0.50 per subscriber

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[31] *A la Carte Programming Report* at 70 (emphases added, except emphasis to "changes" which occurs in the original).

[32] *See* JCC Comments at 11 (quoting Rogerson Study at 37).

per month.[33] An offer by EchoStar five years ago of $0.50 per subscriber per month for the ability to retransmit and resell to its subscribers the signals of the CBS-owned stations speaks volumes about the economic value MVPDs place upon broadcast signals—bundled or unbundled—and the ability of MVPDs to resell the signals to their subscribers for profit. It underscores the absurdity of the argument that Congress and the Commission should reward MVPDs by giving them free access to programming for which they otherwise, in an arm's-length negotiation in the open market, will pay $0.50 per subscriber per month.

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> *Assertion*: "A cable operator's only source of bargaining power in retransmission consent negotiations with a broadcast station is its ability to decide not to carry the signal of that station."[34]

Response: Despite increased competition from DBS, cable still commands a 61% penetration rate of all television households.[35] Few, if any, of these households possess outdoor antennas. In most industries, competitors would relish a 61% market share to establish their bargaining position. Only the Joint Cable Commenters are so bold to claim that a 61% market share is insufficient to fend off the so-called "market power" of local television stations. As a result of cable's market share, the Joint Cable Commenters concede that the vast majority of local television stations are unable to and do not negotiate for cash or for carriage of affiliated programming channels. They state: "Programmers not affiliated with the four major broadcasters generally have difficulty arranging

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[33] *EchoStar Satellite L.L.C. v. Viacom, Inc.*, Case No. C-04-0049 CW (N.D. Cal.), *Rebuttal Declaration of Michael S. Schwimmer in Support of Motion for Temporary Restraining Order* at ¶ 16.

[34] JCC Comments at 14.

[35] *See Eleventh Annual Video Competition Report*, FCC 05-13 (Feb. 4, 2005), at ¶ 14.

carriage for their new networks and often are forced to charge no license fee and perhaps even to make cash payments to MVPDs in return for carriage."[36] This is hardly an argument for additional, unnecessary government intrusion.

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> *Assertion*: "As a result [of the program exclusivity rules], each network affiliate is protected from intra-brand competition within its local marketplace, with the unintended result of strengthening the exclusivity that government regulations grant network broadcasters . . . ."[37]

Response: "Government regulations" do **not** grant broadcast stations program exclusivity. Broadcast stations negotiate and pay their program suppliers for program exclusivity in the open market, just as MVPDs do. The only thing the Commission's program exclusivity rules provide is a forum for restricted and limited enforcement by that agency of the programming contracts entered into by the parties. Moreover, unlike program supply contracts that MVPDs enter into with their networks and program suppliers, the Commission's program exclusivity rules *limit* and *restrict* the geographic scope of the exclusivity that broadcast stations may negotiate from their program suppliers. Thus, the program exclusivity protection available to local television stations is more regulated and is significantly *less* than the exclusivity protection available to MVPDs whose program exclusivity agreements with their program suppliers *are not regulated at all by the Commission.* The arguments by the Joint Cable Commenters that broadcast stations should be stripped of the limited program exclusivity they now enjoy collapses from its own unfairness and illogic.

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[36] JCC Comments, Rogerson Study at 4.

[37] JCC Comments at 14.

> *Assertion*: "[T]here is no demonstrable evidence to suggest that retransmission consent has strengthened localism or facilitated the ability of local stations to compete for marquee local programming."[38]

Response: The assertion is not true. Even though cable operators have generally refused to pay cash to broadcast stations, some stations have been able to negotiate other forms of consideration with the result that they have had additional resources to develop more and better local programming. Some non-network-owned broadcasters have created local and regional cable news channels from retransmission consent negotiations, e.g., Cox Broadcasting's local cable news channel in the Pittsburgh region (Pittsburgh Cable News Channel (PCNC)); Belo Corp.'s regional cable news channel (NorthWest Cable News (NWCN)); four local cable news channels that Belo and Cox Communications operate in partnership (Arizona NewsChannel, ¡Más! Arizona; Local News on Cable (serving Virginia), and NewsWatch on Channel 15 (serving Louisiana)); Allbritton Communications' local cable news channel in Washington, D.C. (NewsChannel 8), and Dispatch Broadcast Group's Ohio News Network. There are numerous others. A number of NBC Television Network affiliates have formed a company co-owned by NBC and its corporate affiliates to create the NBC Weather Plus Network, and local stations affiliated with this new national/local weather service have negotiated for its carriage on various cable systems. In addition, local stations have also negotiated for station promotional spots and for agreement by the MVPD to purchase advertising on the stations. And some network-affiliated broadcast stations have recently been able to negotiate dual carriage of their digital signals, including multicast carriage, which, in view of the

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[38] JCC Comments at 32; *see also* Rogerson Study at 5 ("Very little evidence of any sort has been presented suggesting that broadcasters have used the extra revenue stream provided to them by retransmission consent to invest in higher quality broadcast programming.").

Commission's rejection of mandatory dual carriage and of multicast carriage, is all the more critical to the DTV transition. In fact, Commissioners have recently acknowledged and recognized the importance of negotiated carriage arrangements for digital signals, including multicast channels, as reflected in the recent NCTA/APTS digital carriage accord.[39] These are but some of the ways that non-network-owned broadcast stations have constructively utilized the retransmission consent process to strengthen localism, increase program diversity, and benefit viewers.

The examples cited above are the success stories. For every such success story of cooperation by an MVPD in launching new services, there are countless other cases in which MVPDs are refusing to carry local broadcast channels the MVPD believes may be competitive with its own programs and its own sale of advertising. Broadcasters have repeatedly advised the Commission that local stations are no match for some cable operators in terms of securing digital program services that cable operators believe to be competitive with their own. Local television stations—large and small—are constantly confronted in retransmission consent negotiations with the "take it or leave it" non-negotiable demands of MVPDs. In the pending retransmission dispute between one of the Joint Cable Commenters, Cox, and Nexstar Broadcasting, pleadings filed in the case indicate that Cox has refused to pay cash—in any amount—for the stations' signals. When told by Nexstar that the stations could be carried pending resolution of negotiations in exchange for agreement to pay as little as one cent per subscriber per month, Cox apparently refused. So much for the MVPD argument that broadcast programming is "must-have" programming! If a broadcast

[39] *See Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commisison's Rules*, Second Report and Order and First Order on Reconsideration, FCC 05-27 (released Feb. 23, 2005), Statement of Commissioner Abernathy, Statement of Commissioner Copps, and Statement of Commissioner Adelstein.

station signal is not worth at least a penny per subscriber per month, it is difficult to conceive how something apparently worth so little can be transformed into "must-have" programming or can arm a station with "market power."

The reality, of course, is that MVPDs exploit *their* "market power" and the retransmission consent process to insulate themselves from programming and advertising by local stations. Various cable operators are demanding (and are unwilling to drop or temper their demands) that as a condition of retransmission, local stations must agree *not* to carry certain kinds of programming and advertising that may be competitive with the MVPD's own programming and advertising. Historically, cable systems have not conditioned carriage or retransmission of a local television station's programming on the kinds of programming or advertising the local station is broadcasting—until now. Local stations—group broadcasters and single station owners, network affiliates and independents alike—are finding that several of the largest cable MSOs—many of which are vertically integrated with ownership of multiple television programming services—are also flatly refusing to carry the digital multicast programming of local stations that the MSOs believe to be competitive with their own. Some MVPDs insist that the multicast programming of local broadcast stations be "co-branded" with the MVPD to suggest to viewers that the programming is provided by the MVPD when, in fact, it is not. All of this, of course, is reflective of the "market power" MVPDs have over local stations, instead of the other way around.

MVPDs control access to some 61% of the nation's television households with the ability to deliver hundreds of channels of programming and to deny local broadcast stations access to their subscribers. MVPDs have the economic clout to deny retransmission and carriage of competitive digital channels that compete for viewers and advertising with the programming and advertising programming of the MVPDs. This rank abuse of MVPD market power is not only depriving local viewers of new digital program services, it is frustrating and obstructing the digital transition.[40]

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> *Assertion*: "The presence of two strong national DBS providers offering their customers access to local broadcast signals significantly increases the risk of subscriber defections associated with failing to reach a retransmission consent agreement, thereby substantially enhancing the bargaining power of broadcasters."[41]

Response: That the introduction of satellite carriage of local stations and competition among MVPDs has inured to the benefit of broadcast stations (and other program suppliers, for that matter) whose programs are attractive to viewers should come as no surprise. This is precisely the result Congress intended! The complaint of the Joint Cable Commenters is simply a complaint about the competitive effects of competition from satellite carriers. That certain MVPDs, as a result of competition from other MVPDs, may in the future find it necessary to pay for broadcast signals they previously obtained for free is hardly grounds for Commission or congressional concern. Indeed, it would be an affirmation that the forces of competition that Congress and the Commission intended are at work. Clearly, in enacting section 325 of the Communications Act (the retransmission consent provision), Congress contemplated that the day would come when MVPDs could no longer retransmit broadcast station signals and resell them for profit without the station's consent and with no compensation. Although the marketplace may in the future be more competitive for MVPDs than

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[40] Time Warner Cable clearly is an exception. It entered into a retransmission consent agreement with ABC in which it agreed unconditionally to carry the full 19.4 megabit digital signal, including multicast programming, of ABC-owned stations and the more than 200 local stations affiliated with the ABC Network.

[41] JCC Comments at 39; *see also* Rogerson Study at 29.

in the past, the ultimate beneficiaries of that competition (and of the new and diverse programming that will result from it) will be local viewers. It is the statutory charge of the Commission to protect the interests of *viewers*—not the self-interests of the Joint Cable Commenters. It would be a giant step backwards for Congress or the Commission to insulate cable and satellite companies from competition with each other.

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> *Assertion*: "Retransmission consent leverage by the Big Four has been a principal driver of cable rate increases."[42]

Response: This assertion is contradicted by the economic study performed by the General Accounting Office. The Joint Cable Commenters ignore this study entirely and Rogerson skirts it. In late 2003, the GAO determined that broadcaster ownership of national cable networks, whose cable carriage is assisted through the retransmission consent negotiation process, does **not** result in cable systems paying higher fees for such broadcaster-owned networks than for other cable networks:

> In particular, we found that cable networks that have an ownership affiliation with a broadcaster did **not** have, on average, higher license fees (i.e., the fee the cable operator pays to the cable network) than cable networks that were not majority-owned by broadcasters or cable operators.[43]

In addition, the GAO had evidence that "at least *half* of the license fees cable operators pay to carry their networks are recouped through the sale of the local advertising time that cable networks allow

[42] JCC Comments at 40.

[43] U.S. General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 (Oct. 2003), at 28-29 (emphasis added).

the cable operators to sell."[44]

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> *Assertion*: "Subscribers to MVPDs are harmed by broadcasters' exercise of market power regardless of whether it occurs through broadcasters charging higher license fees for programming or through broadcasters forcing cable operators to purchase additional programming."[45]

Response: MVPD subscribers are not harmed by consideration flowing to broadcast stations but, rather, are manifestly *benefitted.* As a consequence of this complained-of consideration, consumers have *greater choice* among a *greater diversity* of programming options. Moreover, the Joint Cable Commenters acknowledge that the "broadcast networks today own ten of the fifteen *top-rated* cable channels, compared to only three of fifteen in 1996."[46] The greater popularity of broadcast network-owned cable/satellite programming is the best evidence that those license fees are paying for programming viewers actually like, rather than the programming owned, controlled, and provided by the MVPDs.

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> *Assertion*: "The license fees for cable channels in the top forty that are affiliated with broadcasters increased almost 92 percent between 1997 and 2004," to $8.70 per month.[47]

Response: The Joint Cable Commenters' total of $8.70 per month for subscriber license fees for the top 40 network-affiliated cable channels begs the question of why the Joint Cable

[44] *Id.* at 24 (emphasis in original).

[45] JCC Comments at 45.

[46] JCC Comments at 19 (emphasis added).

[47] JCC Comments at 46-47 & Table F.

Commenters charge subscribers $41.04 per month to receive these channels.[48] That is a substantial mark-up, especially since cable operators, by their own admission, rarely, if ever, pay license fees to non-network broadcast stations for their local broadcast signals and only pay $3.13 per month in non-broadcaster (presumably non-network) affiliated license fees for the remaining channels offered in the expanded basic service tier.

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> *Assertion*: Retransmission consent "provides broadcasters with a second revenue stream in addition to the revenue they earn from selling advertising."[49]

Response: That may well be true in a few cases, but it is hardly grounds for government intervention. Moreover, the Joint Cable Commenters contradict their own generalization three pages later by the statement that "[p]rogrammers not affiliated with the four major broadcasters generally have difficulty arranging carriage for their new networks and often are forced to charge no license fee and perhaps even to make cash payments to MVPDs in return for carriage."[50] This assertion is typical of numerous contradictions and inaccurate assertions throughout the comments of the Joint Cable Commenters. The cumulative effect of these contradictions and inconsistencies, of course, is to undermine and discredit the intellectual integrity of the arguments on which the assertions are premised.

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> *Assertion*: "If Disney and the other major networks are each able to extract even a

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[48] *See* JCC Comments at 48, Table H.

[49] JCC Comments, Rogerson Study at 1.

[50] JCC Comments, Rogerson Study at 4.

> fraction of this amount [i.e., the $2.00 to $2.09 per month subscriber license fee that Disney has shown to be reasonable], this would represent a very significant cost to MVPD subscribers."[51]

Response: Accepting Disney's estimate of the economic value of the broadcast signals of its owned-and-operated ABC stations (which Disney believed to be on the low end), and assuming the value of the signals of the other networks' O&Os is equivalent (a not unreasonable assumption given the relative ratings of the networks over the past several years), then the total monthly license fee for a complement of the four networks would be $8.00 to $8.36. Yet this total license fee is right in line with the total monthly license fees of the network-owned cable channels, $8.70, cited by the Joint Cable Commenters. This close relationship in the economic value of the broadcast signals and of the license fees for the cable networks shows, not that MVPD subscribers are being gouged by the broadcast networks, but, rather, that the consideration the networks have been paid for their retransmission consent, i.e., carriage of these popular network-owned programming services, is comparable to the consideration that the networks would have been paid for retransmission of the broadcast signals of their O&Os had cable not refused to pay cash compensation in the first place. In other words, as noted earlier, the market has functioned remarkably well in valuing the retransmission consent rights that are at stake and there is nothing to suggest that MVPDs are paying an unreasonable or unfair price for their most popular programming.

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> *Assertion*: "[C]able MSOs or their affiliates were the major owners of program networks in 1993. While the major broadcast networks owned some non-broadcast networks, their ownership share was less significant. However, by 2004 the relative

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[51] JCC Comments, Rogerson Study at 5.

positions of these two groups had been reversed."[52]

Response: This assertion by the Joint Cable Commenters confirms that cable was the beneficiary of the previous government-imposed advantage given to it and which Congress recognized in enacting the 1992 Cable Act's requirement that cable companies secure the consent of local stations before retransmitting their signals and selling them to subscribers for profit. Once Congress gave broadcasters authority to negotiate with parties who wish to retransmit and resell their signals, the subsidy was removed, which in turn enabled broadcasters to compete with cable on a less than equal, but, nevertheless, better footing. The retransmission consent process was enacted by Congress to stop an unconscionable subsidy from one segment of the industry to the other:

> Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an *effective subsidy* of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the two industries.[53]
>
> Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy

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[52] JCC Comments, Rogerson Study at 9.

[53] H.R. CONF. REP. 102-862 (1992), at 58, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1240 (emphasis added).

> supports a system under which broadcasters *in effect subsidize* the establishment of their chief competitors.[54]

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Taken together, these unsupported assertions and false generalizations undermine the credibility of the comments of the Joint Cable Commenters. Put plainly, their comments do not reflect the reality of the retransmission consent world and provide no aid to the Commission in fashioning its report to Congress.

IV. The Additional "Wish Lists" for Government Intrusions into the Marketplace Should Be Rejected

Several MVPDs (BellSouth, EchoStar, ACA, and NCTA) are using the Commission's inquiry process to advocate for excessive, unjustifiable regulation. Because these intrusions, without any offsetting public interest benefits, would largely abnegate the purposes for which the congressionally-sanctioned retransmission consent and program exclusivity regimes exist, as set forth in detail in the Network Affiliates' opening comments, the Commission should refrain from making any such recommendations.

BellSouth, just as it had done five years ago in the SHVIA retransmission consent proceeding (CS Docket No. 99-363), continues to advocate for non-discrimination requirements in retransmission consent negotiations. But not only did Congress reject applying non-discrimination

[54] S. REP. 102-92 (1992), at 35, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168 (emphasis added).

requirements in SHVIA,[55] the history of the past five years clearly shows that they are not necessary. BellSouth fails to cite a single example of broadcaster discrimination (much less a practice that constitutes anti-competitive conduct justifying congressional or Commission action) or any broadcast station retransmission consent negotiation in violation of 47 U.S.C. § 325(b)(3)(C)(ii). BellSouth speculates that broadcast stations may "take a much tougher stance" in their negotiations in the future.[56] The difference between a "tougher" stance and an illegal or "anti-competitive" negotiating stance is obvious. The former is of no consequence to the Commission or Congress; the latter, of course, is, and Congress and the Commission have in place a host of regulatory and judicial remedies to address it. Whether broadcast stations will "toughen" their negotiating position as the MVPD market becomes more competitive remains to be seen. This is rank speculation on BellSouth's part. However, if the introduction of competition in the MVPD market enhances the negotiating position of broadcast stations, that result hardly justifies the imposition by the Commission or Congress of non-discrimination requirements—any more than could be justified for imposing non-discrimination requirements on ESPN, A&E, Lifetime, or other popular cable/satellite program services not jointly owned with a cable company or other competitive MVPDs. In previously rejecting these arguments in the SHVIA proceeding, the Commission recognized that "retransmission consent negotiations are the market through which the relative benefits and costs to the broadcaster and MVPD are established."[57] Indeed, the Commission cited numerous "examples of bargaining proposals

[55] *Compare* 145 Cong. Rec. H2312 (Apr. 27, 1999) *with* 145 Cong. Rec. H2320 (Apr. 27, 1999) *and* 47 U.S.C. § 325(b)(3)(C)(ii).

[56] BellSouth Comments at 5.

[57] *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445 (2000) ("*Good Faith*
(continued...)

presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirement," the first of which—"[p]roposals for compensation above that agreed to with other MVPDs in the same market"—expressly *permits* discrimination in rates and terms.[58]

BellSouth adds further to its "wish list" that broadcast stations should not be permitted to condition carriage of their analog signal on carriage of their digital signal.[59] But the Commission has already properly determined that such a conditional carriage proposal is perfectly legal,[60] and, indeed, *expects* that this will be the mechanism by which digital signals will come to be retransmitted by MVPDs.[61] If broadcast stations could not obtain carriage of their digital signals in this manner, especially in light of the Commission's refusal to require dual carriage, then the DTV transition, plainly, cannot be completed, and the benefits of DTV will not accrue to consumers. Nothing would be more detrimental to the digital transition than for the Commission (1) to deny dual must carry (as it has done) and then (2) to prohibit a station from negotiating for dual carriage.

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[57](...continued)
Order"), at ¶ 53.

[58] *Good Faith Order* at ¶ 56.

[59] BellSouth Comments at 8.

[60] *See Good Faith Order* at ¶ 56 (finding that "[p]roposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals" are presumptively consistent with competitive marketplace considerations and the good faith negotiation requirement); *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rule Making, 22 Comm. Reg. 1243 (P & F) (2001), at ¶ 35 ("One example of a bargaining proposal presumptively consistent with the good faith negotiation requirement is a proposal for carriage of the analog broadcast signal conditioned on carriage of any other broadcaster-owned programming stream, such as the digital signal.").

[61] *See Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commisison's Rules*, Second Report and Order and First Order on Reconsideration, FCC 05-27 (released Feb. 23, 2005), Statement of Commissioner Abernathy, Statement of Commissioner Copps, and Statement of Commissioner Adelstein.

It is obvious that the real concern of many of the MVPD commenters, as noted earlier, is with competition from each other—not from local television stations—and their proposals to the Commission amount to a request that the Commission and Congress insulate or exempt them from competition with each other—a plea, in effect, to "save us from ourselves." But, as also noted earlier, the Commission is well aware that it is the role of Congress and the Commission to protect competition—not competitors. And, of course, MVPDs cannot have it both ways. They cannot ask Congress and the Commission to exempt them from rate regulation on the basis that they now compete with each other, head to head, and then ask the government to mandate access to their most profitable and popular sources of programming from broadcasters so that they may be insulated and protected from the very competition on which the deregulation is premised.

EchoStar asks the Commission to prohibit broadcast stations from conditioning carriage of their main station on a requirement for carriage of satellite and low power televisions stations, carriage of stations in other markets, or carriage of cable networks.[62] The response, of course, is the same as to BellSouth's complaint. The Commission has repeatedly considered and concluded that each of these proposals is presumptively consistent with competitive marketplace considerations.[63]

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[62] *See* EchoStar Comments at 3-8.

[63] *See Good Faith Order* at ¶ 56 (finding that "[p]roposals for carriage conditioned on carriage of any other programming, such as . . . an affiliated cable programming service, or another broadcast station either in the same or a different market" are presumptively consistent with competitive marketplace considerations and the good faith negotiation requirement); *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rule Making, 22 Comm. Reg. 1243 (P & F) (2001), at ¶ 35 (stating, *inter alia*, that "we will not adopt rules specifically prohibiting tying arrangements at this time. In coming to this conclusion, we recognize that substantial evidence must be presented to support a claim that a tying arrangement exists and that the operator suffers harm as a result. Without proof to support the case, it is difficult for the Commission to formulate an appropriate remedy."); *A la Carte Programming Report* at 80
(continued...)

EchoStar points to only two retransmission consent disputes since the retransmission consent regime has been in place, "Time Warner/Disney in 2000 and EchoStar/Viacom in 2004,"[64] but neither of those disputes required either Commission or judicial resolution of the merits, confirming that the marketplace can and does work. The fact is, EchoStar and other MVPDs possess multiple remedies for any retransmission consent grievances. Unless it is shown that these remedies do not work, it would plainly be inappropriate (and a waste of resources) for the Commission to fashion additional remedies for recommendation to Congress.

Moreover, as noted earlier, only eight "good faith" complaints have been filed at the Commission. EchoStar has filed four of them, and it has prevailed in none—not a single one. Given the size of these industries, the number of such negotiations, and the dollar value of the disputes, the number of such complaints is, by any standard, *de minimis*.[65] EchoStar's assertion that broadcast stations' conditional carriage proposals violate the antitrust laws has already been considered and rejected by the Commission. Even so, the courts offer another avenue for EchoStar to pursue claims of anti-competitive conduct, but it has done so in only one instance (against Viacom), and EchoStar settled that case on terms which it found to be acceptable.[66] In short, there is simply no evidence of

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[63](...continued)
(stating that bundling issues "are best left to commercial negotiations between MVPDs and program networks. They are appropriately situated to evaluate the trade-offs involved in negotiating license fees and other business arrangements.").

[64] EchoStar Comments at 4.

[65] *See* Network Affiliates Comments at 7 nn. 22-23.

[66] *See* EchoStar Comments at ii, 5 n.12; *see also A la Carte Programming Report* at 80 (reporting to Congress that "the current retransmission consent process is a function of the statutory framework adopted by Congress and we cannot conclude that it is not working as intended. Further, to the extent tying arrangements for the carriage of particular programming [are] being used for (continued...)

anti-competitive behavior by broadcast stations or a failure of existing law that warrants additional regulation of these negotiations.

EchoStar adds a host of other regulatory "wishes," each of which is equally without merit. EchoStar seeks to have the distant signal compulsory license made permanent,[67] but, in enacting SHVERA, Congress has, again, recognized that the § 119 compulsory license is "temporary," that its "abrogation" of fundamental property rights is to be confined "to only those circumstances that are absolutely necessary to provide a 'life-line' service," and that its extension for five additional years is "appropriate and consistent with prior extensions":

> Given the ongoing transition of the broadcast television industry from analog transmission to digital, it is in the public interest for Congress to reexamine the terms and conditions of the § 119 license in 5 years and to make any necessary adjustments at that time.[68]

SHVERA contains numerous provisions to phase out distant signal delivery,[69] and there is no basis at this time to make permanent "valuable accommodations that benefit the DBS industry."[70]

EchoStar's attempt to change the sunset date (December 31, 2008) for "significantly viewed"

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[66](...continued)
anti-competitive ends, the antitrust laws provide an adequate remedy.").

[67] *See* EchoStar Comments at 13-14.

[68] H.R. REP. 108-660 (2004), at 9, 11, 12.

[69] *See, e.g.*, SHVERA, § 103(1) (to be codified at 17 U.S.C. § 119(a)(4)(A)-(D)).

[70] H.R. REP. 108-660, at 9. *See also* 150 Cong. Rec. H8218 (Oct. 6, 2004) (statement of Rep. Berman) ("When Congress revisits this issue in 2009, it may reach a different conclusion or even decide to do away with both licenses."); 150 Cong. Rec. H8222 (Oct. 6, 2004) (statement of Rep. Buyer) ("[L]ocal-to-local service is the right way, and—except when there is no other choice—distant network stations are the wrong way[] to deliver broadcast programming by satellite. Local-to-local fosters localism and helps keep free, over-the-air television available to everyone, while delivery of distant network stations to households that can receive their own local stations (whether over the air or via local-to-local service) has just the opposite effect.").

waivers[71] ignores the obvious intent of Congress to differentiate this type of waiver from the others. Indeed, it is the only waiver provision with an express sunset date.[72] It is a well-established canon of statutory construction that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[73]

Finally, EchoStar's request that the Commission establish an electronic clearinghouse for receipt of carriage elections[74] is but a naked attempt to have taxpayers foot the bill for (i.e., subsidize further) EchoStar's own administrative and overhead costs. Simply dealing with the problems EchoStar routinely causes through its abusive and harassing litigation tactics is burdensome enough on the Commission, on Congress, on taxpayers, and on the communications industry.[75] EchoStar,

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[71] *See* EchoStar Comments at 14-15.

[72] *See* SHVERA, § 102(6) (to be codified at 17 U.S.C. § 119(a)(3)(C)(ii)).

[73] *Rusello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks and citation omitted); *see also Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2754 (2004) (stating that "the usual rule [is] that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended" (internal quotation marks and citation omitted)).

[74] *See* EchoStar Comments at 15-16.

[75] EchoStar has repeatedly burdened the Commission's resources in requiring it to deal with EchoStar's abusive tactics that have resulted in fines and other sanctions. *See Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, FCC 02-284 (released Oct. 18, 2002), at ¶ 29 n.122; *EchoStar Satellite Corp. v. Young Broadcasting*, 16 FCC Rcd 15070 (2001), at ¶ 12 (admonishing EchoStar for "abuse of process"); *National Ass'n of Broadcasters and Ass'n of Local Television Stations; Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, 17 FCC Rcd 6065 (2002), at ¶ 37 n.116 (cataloguing extensive list of EchoStar's "'disingenuous' behavior and lack of candor").

Courts have also been forced to repeatedly deal with and cite EchoStar for its misconduct. *See CBS Broadcasting Inc. v. EchoStar Communications Corp.*, 276 F. Supp. 2d 1237 (S.D. Fla.

(continued...)

a multi-billion dollar company whose accounting practices for alleged corporate self-dealing and illegal conduct are under investigation, hardly qualifies for additional government subsidies.

ACA also has an extensive—and equally meritless—"wish" list. ACA complains of "competitive harm caused by abuse of broadcast exclusivity."[76] Notably absent, however, is any actual evidence of harm. ACA speculates that "[t]his will erupt into a crisis in the very near future."[77] Crisis for whom? ACA's members? Surely not for their viewers. The Commission's regulatory scheme is not intended to insulate small cable companies from having to pay for their programming—whether it comes from cable networks or from local broadcast stations. Interestingly, ACA states that "more than half" of its members "serve fewer than 1,000 subscribers"[78]; in other words, most of ACA's members are already exempt from the Commission's broadcast network

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[75](...continued)
2003), ¶ 46 (finding that EchoStar had knowingly broken a sworn promise to the court); *CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, No. 02—1434 (PAC) (D. Colo. Sept. 1, 2004), at 2 (finding that EchoStar had made a "patently frivolous" argument that was a "waste of time and resources" and characterizing EchoStar as a "vexatious litigant"); *CBS Broadcasting Inc. v. EchoStar Communications Corp.*, Misc. Nos. 02-400, 02-402, Memorandum Order (W.D. Pa. Apr. 17, 2003) (sanctioning EchoStar for discovery abuses); *id.*, Order (W.D. Pa. Apr. 27, 2003) (awarding attorney's fees and costs against EchoStar); *EchoStar Satellite Corp. v. NDS Group PLC*, No. SACV 03-0950 DOC (ANx), Civil Minutes (C.D. Cal. July 21, 2004) (finding that EchoStar's intentionally "vague and misleading" pleading, which amounted to "purposeful vagueness," "suggest[ed] bad faith on the part of" EchoStar); *EchoStar Satellite Corp. v. Brockbank Ins. Servs.*, No. 00-CV-1513, Order and Judgment (D. Colo. Sept. 26, 2002) (sanctioning EchoStar for filing frivolous lawsuit and awarding attorney's fees against EchoStar); *id.* No. 00-MK-1513 (PAC), Order Declining to Adopt Magistrate Judge's Recommendations, and Instead Imposing Sanctions Under the Court's Inherent Authority (D. Colo. Feb. 5, 2004), at 23 & n.17 (finding that EchoStar's misconduct "rose to the level of conscious wrongdoing" and citing the *Young Broadcasting* case from the Commission).

[76] ACA Comments at 4.

[77] ACA Comments at 4.

[78] ACA Comments at 4.

non-duplication and syndicated program exclusivity rules, a fact which undermines the credibility of ACA's argument. In any event, ACA's complaint ignores the history and purpose of the program exclusivity and retransmission consent rules, which plainly evince Congress's knowledge and intent that they work in harmony.[79]

In addition, ACA's "the sky is falling" mantra is belied and contradicted by recent statements by small cable operators in other fora. The financial burden small cable operators are facing is the result of the cost of the technical upgrades of their systems. (This is the same burden, incidentally, that local broadcast stations, particularly those in small, rural markets, are confronting.) As Ben Hooks, President of Buford Media, which owns 69 small-market cable systems, recently stated: "Once you get the broadband network, it stabilizes the business. *The future is really bright*, but the pain is getting up to speed."[80] Michael Pandzik, the CEO of the National Cable Television Cooperative, recently stated, "These guys [small cable operators] can be very competitive. These guys are not selling out, because they don't want to sell out. They're hanging in there, rebuilding systems, and bringing them along."[81] The fact is that ACA's trumped-up, unsupported claim of financial hardship cannot serve as the basis for modification of the Commission's network

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[79] *See* Network Affiliates Comments at 4-5; S REP. 102-92, at 38, *reprinted in* 1992 U.S.C.C.A.N. 1131, 1171; *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 6723 (1994), ¶ 114 (noting that the policies of both retransmission consent and program exclusivity "promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view").

[80] Jay Sherman, *Rough Ride for the Little Guys; Challenges Abound for Small-Market Cablers, but Innovators Have Bright Futures*, TELEVISIONWEEK (Feb. 28, 2005), at 18 (emphasis added).

[81] *Id.* at 20; *see also id.* ("Industry players said small cable operators can do an adequate job of beating back satellite if they have an advanced two-way network. The cost of equipment and labor have come down enough that even a system with just 800 subscribers can swing it.").

non-duplication and syndicated exclusivity rules.

What is particularly ironic about ACA's dire claims is that small market broadcast stations, serving many of the rural markets that are served by ACA's members, are in financial straits due to competition from cable operators. The value of these stations has fallen considerably in recent years just as cable program services have taken one-half of their audience and broadband delivery of video services is poised to take a chunk out of the remaining half of the audience currently viewing these small market local stations. Small market broadcast stations are already struggling to survive in a sea of alternative programming services supported by dual streams of income. Many broadcasters fear that if, in a smaller market, a station is not one of the two top-rated, it may not survive the next decade. The potential failure of these small market stations will obviously harm localism, especially since, outside of the larger markets, there is virtually no local cable programming. These small market broadcast stations are not asking for a handout, but they should not be pushed down by the likes of ACA-desired governmental interventions just as MVPD competition may finally give them hope that will be able to negotiate on a more level competitive playing field.

Finally, NCTA appears to believe that cable operators should be entitled not just to *parallel* statutory and regulatory structures that respect the differences in the distribution modes of the cable and satellite industries but actually to *exactly* the same perks, privileges, and provisions, irrespective of the structural differences in the two industries so that cable would become prized over satellite—and at the expense of broadcasters. Thus, NCTA seeks an exemption from the retransmission consent requirement to enable a cable operator to retransmit a distant network station to so-called "white area" consumers.[82] This "wish," however, entirely ignores the fact that the § 119 distant signal license was enacted to provide "life-line" network television service to subscribers who not only could not receive service over the air but also were not passed by cable, as evidenced by the limitation in the original (but now repealed) "unserved household" definition excluding households that had subscribed to cable service within 90 days of subscribing to satellite service.[83] It also ignores the fact that Congress, in enacting SHVERA, has continued to recognize the "unique historical, technological, and regulatory circumstances that affect each industry," including "the local character of cable systems and the national business model of DBS [that] have resulted in differential public service, carriage, and taxation obligations," in order to achieve an "equilibrium" that does not "sacrifice long-term competitive interests by unfairly favoring one industry over another."[84] Equally important, NCTA ignores the fact that the distant signal compulsory copyright license is temporary and is in the process of being phased out under SHVERA.

Similarly, NCTA's request for abrogation of the broadcast program exclusivity rules is just as misguided.[85] NCTA mischaracterizes the program exclusivity regime as "additional regulatory rights"[86] but, as shown above, the Commission's scheme actually restricts the right of program suppliers and broadcast stations to enter into and enforce program exclusivity agreements beyond a limited geographic area. In contrast, the Commission imposes no limits, has no rules, and does not

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[82] *See* NCTA Comments at 12.

[83] *See* 17 U.S.C. § 119(d)(10) (1988) (repealed by SHVIA in 1999).

[84] H.R. REP. 108-660, at 8-9.

[85] *See* NCTA Comments at 12.

[86] *See* NCTA Comments at 12.

restrict in *any* manner the extent of program exclusivity arrangements that cable and satellite programmers may enter into with cable operators and satellite carriers. Thus, NCTA, like ACA, advocates an asymmetrical program exclusivity regulatory scheme for television stations that would not apply to cable-only program suppliers. If NCTA and ACA are correct (which they are not) that further program exclusivity restrictions should be imposed on television stations, then program exclusivity restrictions, in the interests of regulatory parity, must also be imposed on cable systems and cable/satellite programmers.

NCTA, as ACA does, simply fails to acknowledge that Congress enacted the retransmission consent provisions against the existing framework of program exclusivity, and it fully expected and intended that the two regimes would be exercised in tandem by broadcast stations and their business partners. As the Commission has just reported to Congress in *it's a la Carte Programming Report*:

> The legislative history of the 1992 Cable Act specifically addressed the interplay of network non-duplication with retransmission consent: "[T]he Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendment or deletions of those rules in a manner which would allow distant stations to be substituted on cable systems for carriage [f]or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in [the Act]."[87]

In sum, each of the MVPD interests is seeking greater government regulation, instead of deregulation, but only to promote industry-specific competitive advantages. Because these requests actually seek to disadvantage localism and free over-the-air local television service, the Commission should reject recommending these self-serving and anti-competitive proposals to Congress.

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[87] *A la Carte Programming Report* at 71 (quoting S. REP. 102-92, at 38).

V.
The MVPD Interests Fail to Recognize the Public Interest Benefits of Program Exclusivity

The right of local broadcast stations to contract for and enforce program exclusivity is an important component of a local broadcast station's service that promotes the public interest and maximizes consumer welfare. The many benefits of program exclusivity include the development of wide and diverse programming, the improvement of the programming mix in local television markets, and the promotion of television stations and their local programming and public services. These pro-competitive benefits of program exclusivity are widely recognized and have been acknowledged by the Commission,[88] Congress,[89] and the federal courts in antitrust cases.[90]

Without the right to enforce program exclusivity, the competitive playing field in the *local* market would be tilted in the favor of MVPDs, as it was from 1980 to 1988. Under the copyright compulsory licenses alone, which are in derogation of private property rights, and absent the Commission's program exclusivity rules, local broadcast stations would be unable to enforce exclusive programming contracts while satellite carriers and cable operators could enforce such contracts. In 1988, following eight years without syndicated exclusivity rules but with a compulsory licensing scheme, the Commission acknowledged that the resulting inequity between broadcast stations and cable operators was contrary to the public interest, and it consequently reinstated the syndex rules—thus, restoring broadcast stations' freedom to negotiate for exclusivity. Recognizing

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[88] *See, e.g., Program Exclusivity Order* at ¶¶ 49-89.

[89] *See, e.g.*, 134 Cong. Rec. H10411, H10428 (Oct. 19, 1988).

[90] *See, e.g., Association of Indep. Television Stations, Inc. v. College Football Ass'n.*, 637 F. Supp. 1289 (D. Okla. 1986); *Ralph C. Wilson Indus., Inc. v. American Broad. Cos.*, 598 F. Supp. 694 (N.D. Cal. 1984); *aff'd*, 794 F.2d 1359 (9th Cir. 1986).

that a broadcast station's ability to enforce exclusive programming contracts was pro-competitive and would foster many public benefits, the Commission concluded as follows:

> The restoration of syndicated exclusivity protection will enhance competition in the video marketplace by eliminating unfairness to broadcasters. It will increase incentives to supply the programs viewers want to see and it will encourage the development of a pattern of distribution that makes the best use of the particular advantages of different distribution outlets. It will encourage promotion of programming. Although cable operators may have to make some changes to the way they do business, compliance costs will not be burdensome and, in any event, are outweighed by benefits. Specifically, television viewers generally will be exposed to richer and more diverse programming.[91]

Indeed, exclusive program contracts prohibit duplication of television programming in local markets, which, in turn, increases the value of exclusive programs to local broadcast stations and the attractiveness of such programs to local advertisers. The more revenue a broadcast station makes from local advertisers with a given program, the more a broadcast station is willing to pay a supplier for that program. The increased value of exclusive programs to a broadcast station is largely because program exclusivity prevents audiences from being diverted and spread among the different suppliers of the program in the market. Prevention of audience diversion not only maximizes the value of a program to a particular station, but it also maximizes the overall value of the program because (1) it avoids overexposure of the program which would likely reduce a program's useful life and (2) when audiences are spread among different stations, no one station would be likely to expend the resources necessary to fully develop the program. Program exclusivity ultimately results in more incentives for program suppliers to produce larger quantities of wide and diverse programs.

By allowing local broadcast stations to compete on an even competitive field with cable

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[91] *Program Exclusivity Order* at ¶ 89.

operators and satellite providers, the Commission has recognized that program exclusivity results in more diverse programming, explaining that "program suppliers, like other business people, respond to incentives. . . . Incentives to develop new programs are greatest when program suppliers are able to sell their programs whenever there are viewers (or advertisers) willing to pay for them."[92] Also, in connection with the enactment of the first Satellite Home Viewer Act in 1988, Congress recognized the pro-competitive benefits of program exclusivity and found that "[d]epriving local stations of the ability to enforce their program contracts could cause an erosion of audiences for such local stations because their programming would no longer be unique and distinctive."[93]

As a corollary to increasing incentives for program suppliers to create wide and diverse programming, program exclusivity improves the programming mix in local television markets. Without the ability to enforce exclusive program arrangements, local broadcast stations may find it uneconomical to purchase certain programs that they would purchase if their negotiated exclusivity rights were enforceable.[94] Thus, program exclusivity creates an environment that encourages niche programming. In addition, with program exclusivity and the knowledge that no other program provider will dilute the value of an exclusive program, local stations are more likely to plan and promote their programming schedules so as to compete with another station or program provider. This benefits consumers by fostering a competitive environment where a broadcast station's ability to meet its viewers' demands is maximized, resulting, in turn, in a diverse local mix of original, network, and syndicated programming. As recognized by the Commission, "[p]romoting fair

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[92] *Id.* at ¶¶ 56-57.

[93] 134 Cong. Rec. H10411, H10428 (Oct. 19, 1988).

[94] *See Program Exclusivity Order* at ¶¶ 67-75.

competition between free, over-the-air broadcasting and cable [and satellite providers] helps ensure that local communities will be presented with the most attractive and diverse programming possible."[95]

Indeed, in holding that exclusive programming arrangements generally do not violate the antitrust laws, federal courts have also recognized the benefits of program exclusivity:

> Exclusivity . . . holds the potential to increase the number of available programs and simultaneously minimizes fragmentation of the audience for each offering. It can also increase the value of the exclusively-licensed program by avoiding overexposure of it and thereby extending its useful life. Exclusivity also enhances the uniqueness of the purchaser's identity and of its identification with the program. It facilitates program planning by establishing that the licensed purchaser may air the program without fear that the same program will be aired by a competitor at the same time.[96]

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[95] *Id.* at ¶ 74.

[96] *Association of Indep. Television Stations*, 637 F. Supp. at 1304. Similarly, in *Ralph C. Wilson Indus., Inc. v. American Broad. Cos.*, the court stated:

> [E]xclusivity gives the licensee the incentive to promote and develop the licensed program. Without exclusivity, it is likely that no one licensee would expend the resources necessary to fully develop the program. . . . [E]xclusive licenses . . . promote competition by maximizing the number of available programs and preventing audience fragmentation for a program. . . . This exclusivity also promotes competition by maximizing the program's value and avoiding overexposure, which can shorten the program's useful life. . . . Exclusivity permits each station to plan programming to compete with another station's programming, with the knowledge that no other station will dilute the value of this competitive programming by airing the same program at the same time. . . . Exclusive licenses promote competition among suppliers by providing an incentive to maximize the number of programs offered and by maximizing the suppliers' revenues from the licenses.

598 F. Supp. at 706.

Moreover, program exclusivity provides public benefits beyond creating incentives for diverse programming and an improved local programming mix: program exclusivity has a direct impact on the quality and range of local services offered by broadcast stations. By affording stations the right to enforce exclusive program contracts, a station has a greater incentive to promote itself as the only supplier of a particular program. Thus, program exclusivity gives local stations a competitive tool that can be used to call attention to a particular program, to help a local broadcast station create a distinctive public image, and to "alert viewers to the general attractiveness of the broadcaster's whole range of programming."[97] Furthermore, by allowing broadcast stations to maximize the value of a particular program through exclusive arrangements and, in turn, increase advertising sales in connection with such programs, broadcast stations are able to deploy additional capital to enhance other services broadcast stations provide to the local public. Such additional capital permits increased development and promotion of local news, local weather, local emergency programming, educational programming, local public service announcements, local issue-responsive and public affairs programming, and participation by local broadcast stations in community and educational events. Such local services are key to "localism"—none of which is available through the importation of programs from distant stations and other distant program providers such as cable operators and satellite carriers.

In sum, by allowing local broadcast stations to compete on a level playing field with cable operators and satellite carriers, program exclusivity results in many pro-competitive benefits that advance the public interest. Since the Commission's reinstatement of program exclusivity in 1988, the public has benefitted from wide and diverse television programming, unique local programming

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[97] *Program Exclusivity Order* at ¶ 61.

mixes, and enhanced local television programming and public service. There is no evidence of harm, let alone substantial harm, outweighing these many benefits.

Conclusion

For the foregoing reasons, as well as those set forth in the Network Affiliates' opening comments, there is no need for the Commission to recommend to Congress any changes in the retransmission consent and program exclusivity regimes at this time.

Respectfully submitted,

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